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1943-1944

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The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

IN THIS ISSUE you will find a complete list of all committees. The retiring President, Editor, Treasurer, Secretary and former Secretary, Richard B. Montgomery, Jr., met with your President in Jackson on July 29th and 30th in accordance with instructions of the Executive Committee at our last meeting in Chicago for the purpose of making definite plans with respect to an assistant for the Secretary or Treasurer, or both; and at that time and with the benefit of the good help and judgment of these officers the above mentioned committee assignments were completed. Our most difficult task resulted from the fact that we have such an abundance of top notch material available for committee work. It affords me much pleasure and satisfaction to report to you that there has already been a most hearty response from these new committeemen and the Association will have something worthwhile to look forward to upon completion of their work.

I wish to express a word of thanks and appreciation to Miss Opal Sutton, who for nearly nine years has served faithfully, courteously and efficiently as assistant to the Secretary and in so doing I am sure I express the sentiments of all who knew her. To her our best wishes for happiness and continued success. With some changes in the distribution of work between the offices of secretary and treasurer neither of these officers will need a full time assistant and each will function hereafter with such additional part-time secretarial assistance as is found necessary.

May I offer two important suggestions: First, many of you will, by personal experience, or otherwise, know of court decisions or other matters of interest pertaining to the work of various committees. In such a case if you will give the benefit of such information to the appropriate committee chairman it will be of real assistance to the work of that committee. Secondly, the Executive Committee will hold its mid-winter meeting in the early part of the new year and the committee will appreciate any helpful suggestions from the membership, and we certainly want you to feel free to give us the benefit of any such suggestions.

PAT H. EAGER, JR.,

President.

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INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
MASSEY BUILDING,
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The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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ANNOUNCEMENT

The Executive Committee, with the approval of the Secretary and Treasurer of the Association, has arranged for all dues of members to be collected by and paid to Robert M. Noll, Treasurer, Marietta, Ohio. You will recall that heretofore the Secretary has collected dues and then remitted to the Treasurer. The Secretary will perform all of the duties of his office with the exception of the collection of dues. All applications for membership are to be mailed direct to David I. McAlister, Secretary, Washington, Pennsylvania, and accompanying check is to be made payable to Robert M. Noll, Treasurer.

SPECIAL AND GENERAL COMMITTEES

You will find in this issue a list of the Legislative, Membership and all General Committees which the President recently appointed. Regardless of the time given the Association by your President, your Secretary and your Treasurer, the work of the Association cannot be successfully carried on without the aid and assistance of the work of the various committees. I believe each member of the Association appointed to the various committees will take his job seriously and will see to it that the work assigned to his special committee will be carried on throughout the year, and that prior to the annual meeting in 1944 a report will be prepared for submission to the meeting and publication in the Journal. I hope that each committee member will feel free to call on the Journal Office when and as often as it may be of assistance in the work of his respective committee. If any member desires back issues of the Journal, to review reports, they will be promptly furnished.

EQUITABLE SUBROGATION

Your Editor has received a letter from Mr. George L. DeLacy of Omaha, Neb., calling attention to a case recently decided by the Supreme Court of Nebraska, in which he represented the compensation carrier. I am sure some of you will be interested in this decision, which is the case of *Burks v. Packer*, decided May 7, 1943. I understand that during the hearing of a claim for death benefits under the Workmen's Compensation Act it developed that the deceased employee died from an operation from hernia, and a settlement was agreed upon for the sum of $2,000.00. It was agreed in consideration of the settlement that out of any money received from a malpractice suit instituted by the personal representative of the deceased employee against the doctor performing the hernia operation, the compensation insurance carrier was to be reimbursed the $2,000.00 paid in settlement of the Workmen's Compensation case. The insurance company defending the doctor in the said mal-practice action desired to settle that claim, but was unable to pay what the plaintiff therein wanted in excess of the $2,000.00 paid by the compensation insurance carrier in settlement of the compensation claim. Finally, the mal-practice claim was settled with the Administrator for $2,500.00, settling only the doctor's liability in excess of the $2,000.00 subrogation claim of the compensation insurance carrier.

In the mal-practice case the compensation insurance carrier filed an answer setting up their subrogation rights. The lower court forced the compensation insurance carrier to proceed with the mal-practice case, directed a verdict for the doctor therein, and overruled the motion of the insurance carrier for a judgment for the $2,000.00 paid in settlement of the compensation claim. The Supreme Court reversed the lower court and ordered judgment for $2,000.00, and the insurance company protecting the doctor has paid that amount.

The substance of the opinion of the Supreme Court of Nebraska is that where an insurance carrier settles a compensation action, conditioned that it be paid first out of the proceeds of an action, brought by the personal representative of the deceased employee against another person, the amount of compensation paid by it, and the latter action is settled, such insurance carrier is entitled to equitable subrogation in the amount of compensation paid.

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Harold R. Semple, Turks Head Building, Providence.

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P. H. Nelson, Palmetto Building, Columbia.
Donald Russell, Cleveland Law Building, Spartanburg.

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F. G. Warren, Boyce-Greeley Building, Sioux Falls.
M. T. Woods, Sioux Falls.

TENNESSEE

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Charles A. Noone, Chattanooga Bank Building, Chattanooga.
Dan E. McGugin, Jr., American Trust Building, Nashville.

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Ralph Waldo Malone, Southland Life Building, Dallas.
Bert King, City National Bank Building, Wichita Falls.

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D. G. Eggerman, Exchange Building, Seattle.
R. E. Lowe, Paulson Building, Spokane.

WEST VIRGINIA

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Chairman: Kenneth P. Grubb, 828 North Broadway, Milwaukee.
George McD. Schlotthauer, 105 Monona Avenue, Madison.
J. Mearl Sweitzer, Wausau.

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M. A. Kline, Majestic Building, Cheyenne.

CUBA

Chairman: Guillermo Diaz Romanach, The Trust Company Building, Havana.

PANAMA

Chairman: William A. Van Siclen, No. 1 Fourth of July Avenue, Ancon, Canal Zone.

OPEN FORUM

Insurance Aspects of Social Legislation

Chairman: JOHN E. JOHNSTON, Attorney, *Greenville, South Carolina*

DISCUSSION LEADERS

JOHN R. PETERSON
General Counsel
Continental Casualty Company,
Chicago, Ill.

VICTOR C. GORTON
Vice-President & General Counsel
Allstate Insurance Company
Chicago, Ill

C. O. PAULEY
Secretary
Great Northern Life Insurance Co.
Chicago, Ill.

HAROLD S. GORDON
Executive Secretary
Health & Accident Underwriters Conference
Chicago, Ill.

DAN E. McGUGIN
Attorney
Nashville, Tennessee

THE open forum discussion of Monday afternoon was presided over by Mr. John E. Johnston of Greenville, South Carolina. The session convened at 3:10 p. m.

CHAIRMAN JOHNSTON: The war, coming upon us so suddenly, and finding us more or less unprepared, has forced us into a state of feverish activity and has for the time being side-tracked us from noticing issues which were slowly but surely rising to the surface of our times. There is no question in any of our minds but that a definite trend was forming in the Labor conditions of the United States when the present Administration took over. There is no question in my mind (I cannot speak for all of you) but that the relief afforded by the New Deal was merely a relief (although a very worthy and necessary one) but not a cure. Every dynasty, every system, has in the past and will in the future carry certain flaws in its structure; and we will thus always be moving towards a more perfect state of things—but it seems to me that the horizon always recedes as we approach it, and the better the civilization we found, the higher the intellects we will develop to comprehend and look toward and strive for an even higher state. America is a young country in years and as such her economic history was just beginning when this last war struck.

We keep our noses so close to the specific facts in our immediate history that we lose perspective of the whole. We follow a trend up to where the war began, and afterwards, we are so engrossed that we fail to see where the thread emerged on the far side of the upheaval; and worst of all, we fail to see how the trend has grown, even during that hibernation-period—until suddenly a strange new menace looms immediately before us, and we are forced into another terrific struggle, either with bullets and planes, to defend our territorial rights, or with strategies and conferences, to defend our abstract rights. We refuse to use the old experiences to warn us as to new perils. If it weren't for that regrettable quality we might get somewhere faster—or, on the other hand, we might get somewhere too fast! Apparently, this is the basic reason for recurring wars; apparently we will still continue to endure and participate in the same wearisome old quarrels. However, the world, paradoxically, is now in the most fortunate and at the same time the most unfortunate position that it has ever occupied. On the unfortunate side of course is the dreadful loss of life; needless suffering and anxiety; the huge debt which will be a burden on young shoulders for years to come; and worst of all, the wasted years in the lives of young men and their inability to readjustment, after the war. On the fortunate side we have the fact that the two World Wars came so close together that students of economics and social development can, in one lifetime, compare the causes and effects, and their resulting aftermaths and can no doubt thereby avoid some of the same errors in the future. A war which my father or your father underwent, however thrillingly retailed to us, would not and could not make the same impression on us as one suffered at first hand; and we should learn much from the aftermaths of both wars. No doubt, a depression will follow this war, as it did the other; and we should be able from a study of the cause of this last depression to derive some knowledge at least which may alleviate the severity of the coming depression.

The potential giant known as Labor was beginning to stir and protest when this war started, but when the national emergency hit

us, all of the individual exponents of this movement who had any claims to civilization, scrapped (temporarily, at least) their own grievances and combined with all of the other aspirants to an ideal state of civilization.

When the smoke of these battles clears away, we will at first pass through a short period of feverish gaiety—and we will be entitled to it! But one morning John Smith, an American, will awaken, on Main Street, in America. The sun shines across his bed; not the Australian sun, and, just as he has been every morning for the past two months, he is truly thankful for this. There is a smell of bacon and coffee in the air; there is the sound of his children playing in the yard below; his wife's voice in the next room; the sound of traffic in the street. He stretches his arms above his head and feels that it is good to be back home. Then, the reaction overtakes him. He has felt it coming closer for days. It is time that he begin thinking seriously of his family's future. His children are growing up; he is going to have to think of college money soon; sister has talent and should have music lessons—everybody says so; if he could raise enough to get that house out on Cedar Drive, he could garden and keep himself in physical trim; Martha could have a flower garden. His family must at any rate be clothed and fed. He must get back to work; start figuring and fighting for his place in the world. It is true that while he was at the front his employer gave his job temporarily to another man; and it is further true that the other man made good. The company is going to give John Smith his old job—but it is also going to keep the other man—and John Smith knows that unless he can do better than the man who took his place, both he and the other know the ultimate outcome of this contest. But he is not afraid; he has always faced his responsibilities; always met competition. He has never thought of life in any other terms. He is willing to give everything he has to his job, according to his education and understanding. We are not afraid for John Smith. He will have a tough time, but somehow, somewhere, the John Smiths will make their way back into their niches. It is true that there are a great many social evils; it is true that we are studying and fighting to remedy them—but it is also true that we have the courage to fight them inch by inch, and year by year, until gradually we have improved these things.

Now, in order to get the contrast, we will see John Smith under another influence. While he was at war, a great many well-intentioned but impractical people decided that now was the time to start making a UTOPIA of America! And they fixed it so that John Smith would find a warm and happy reception upon his return. What news! He would never have to worry about doctor bills any more; if he were out of work, he would draw unemployment compensation until "they" found something else for him to do; if his wife had a baby she would get her medical attention and also a little stake to start the young fellow off right. When he got old, there would be the Old Age Social Plan—so he needn't worry about putting anything by for his children. It would be a lovely world, no responsibilities; no need to work a little harder than the other fellow. "I must get out and get my old job back. Of course, if it isn't there for me, I at least don't have to worry—it won't break my pride to accept this unemployment for a month or two, if I have to, to get on my feet. I'll rest another day, and go out bright and early tomorrow for my old job back." And this is the beginning of one of the most tragic and disheartening struggles yet recorded in history; the struggle of one John Smith against John Smith. It will take many years for the John Smiths to be lulled into a lethargy; to where they don't care about accepting the "dole"—but at last the majority will do so. Then, it will take many more years for a few of the John Smiths to realize dully whither they are headed, and to try to arouse the lethargic John Smiths. Perhaps we have exaggerated this a little, but we doubt it. In addition to this, going just a little further with the mythical John Smith (who might turn out to be not so mythical) have we realized that this Social Security question is going to be adopted as a wide, white platform by many politicians? They will stand on it and shout to John Smith that if elected they will cure all of the ills of America. The John Smiths have not yet been educated enough to know truly what is good for them. It is for this reason that they need and will follow leaders. It is for this reason that they need employers. Otherwise, they could look out for themselves. The Social Security plan, if carried to an extreme, will result in no happiness, in the long run—no happiness for John Smith; no happiness for his employer. John Smith will, by degrees, cease to have to

use his instinctive urge to be superior and to preserve his family and himself; and, lacking these urges, he will soon cease to think, and become a degraded beggar, all the little personal prides will eventually vanish, and he will become a repulsive beggar, as well—a Government pauper. Give him a taste of freedom and let him float along for a few months on disability or unemployment, and it will then be necessary for the Government bureaus to have him return to some sort of a job. Perhaps they will find him a job; but perhaps his foreman on the new job will also be unjust to him. And so the old story will repeat itself until at last the cry of hardship by the workers will resound against the very Government and bureaus which have been working for their welfare—and then what? It is no pretty thought—you can remember the Place de Greve and Madame DeFarge in the French Revolution.

It seems to me that it would be far better to work this out gradually, preserving both the employer and the employee. Sacrifice the employee to the employer; and private enterprise will break down. Sacrifice the employer to the employee and you get the same result. Allowing capital to have its head ungoverned might have had results—but capital has always had enough sense to know that you must not kill the goose that lays the golden egg; and thus it has at least as much as possible preserved certain rights and privileges to its employees. But with Labor, it is not so. It has never thought of its own welfare in the long run—which is after all, the most important run.

The distance between unemployment compensation and plain charity is not great, and the capacity of people to hurt themselves must always be guarded against by the people who know the results of unbounded charity. All of you have tried to help certain miserable individuals who came across your path. You probably never told anybody what you did for these men; and yet, in the back of your souls is the bitter knowledge that you did not really help them. Most ungratefully they finally came back to you again and again, now demanding that you continue to give. They even accused you of wronging them; you owed them a living now; you had deprived them of their pride and they could not go on under their own steam. (They didn't use those words, but that is what they meant). And the most appalling thing about it was that they were right. All of those who have been in a position to help others know that it is only in certain ways that we dare or have any right to help our fellows. We can only help them to help themselves.

There are so many dangers rampant in this new Delano plan: The Social and Economic dangers I have touched on before. The political dangers are boundless, and you know them without my going into them. One bureau begets another. Someone is going to have to pay for all this Security; and the results will be, as always, excess taxation on the very people who are supposed to benefit from the plan. If these people were wise enough to control their own destinies we would say nothing—but the burden will come to rest at last, as always, on the shoulders that have always borne the economic burdens of the nation: Private enterprise. Private enterprise will be asked to deal with these problems—but they will be given no rights with which to deal with them. The Government Bureaus will control their employee system, necessarily; they will be forced to govern their production by the whims of the employees and by the ultimata of the bureau system. It wouldn't be long, in that case, before Private enterprise itself, began to lose morale.

There is an advertising slogan which is being used now during the war and which is so true that I know you will all appreciate it: "Morale is a lot of little things." And it is! The steps going down are much less perceptible than the steps leading up—perhaps because it takes less effort to go down.

There are a great many improvements that must be made in both our social and economic systems. But let us beware of the narcotic which dulls but does not cure, and which will leave the shaken frame of economic America in a terrible condition, and which will require a gigantic and prolonged effort to clean up the mess—energy and money and time which might have been used for real improvement of those very conditions.

* * *

CHAIRMAN JOHNSTON: Gentlemen, this morning Governor Slaton of Atlanta touched on the subject that we are going to discuss this afternoon. The subject, as you can see by referring to your program, is the Insurance Aspects of Social Legislation. The easiest way that I know is for you to let me introduce these gentlemen and then we will call on them, one after another, and they

will speak for about 15 or 20 minutes apiece, then the whole thing will be thrown open for open discussion and anybody may ask any questions they want to and try to stump the experts.

I will start by introducing Mr. Victor C. Gorton, vice president and general counsel of the Allstate Insurance Company in Chicago.

Mr. John R. Peterson, general counsel of the Continental Casualty Company, Chicago.

Mr. C. O. Pauley, secretary of the Great Northern Life Insurance Company.

Mr. Harold Gordon, executive secretary of the Health and Accident Underwriters Conference.

Mr. Dan E. McGugin, attorney of Nashville, Tennessee.

Since I know the least about the subject, I will turn you over to the experts, and we will start with Mr. Peterson. Mr. Peterson.

* * *

DISCUSSION BY JOHN R. PETERSON

One thing we will have to be careful of and one point I want to make right at the outset is the fact that almost all of us think the same way on this subject. Now, perhaps we don't. There may be some in the audience who don't. I hope they will say so afterwards, so we can get into a discussion, but if we don't recognize that point at the outset, we may fall into the danger that you always get into when you have a group of people all thinking the same way about a particular subject and then discussing it. It is like a group of Republicans sitting down together and all roundly cursing the New Deal Democrats, or, on the other hand, a group of social planners sitting down together and excoriating the hidebound reactionaries that are standing in the way of the wheels of progress. About the only net result of a discussion like that is that each one tries to get a little more vicious, a little more sarcastic, perhaps, than the last speaker; they try to match epithets, and about the only net result is that they all upset their own nervous and digestive systems through all the resentment and everything they are pouring out.

We would like to make it a little different, if we can, today, and see if we can't get some sort of constructive and positive thought on this subject and not entirely a negative attitude. We will have to remember, of course, that since we are all much on the same side of the fence here today, we have to take an objective viewpoint. If we don't, we are just going to be talking from the viewpoint of our own companies or from the viewpoint of the insurance industry, or from the viewpoint of the individual attorneys. If we do that, we don't see the problem as the rest of the world sees it and, consequently, what we say or what we think isn't particularly helpful to the rest of the world. If we don't get that objective viewpoint, we don't get very far in a discussion of this sort.

I am reminded of a story that Abraham Lincoln used to tell. This isn't a humorous story but it does have a point to it. He used to tell about a friend of his who was named Jack Chase. He was a lumberman on the Illinois River and a very expert craftsman. One of his specialties was guiding these rafts of logs down through the rapids in the Illinois River, and there was a very narrow, twisting channel and it was a very difficult job to get them through there. Finally, they put a steamer on the run and he was made captain of the boat. One day as he was going down through there, he always took the wheel himself when he went through that channel, because it was such a difficult job, but the boat was just wallowing and plunging in these rapids and he was exerting every ounce of effort he could to keep it in the channel. A little boy came running down the deck and burst into the captain's cabin and grabbed hold of his coat-tails and pulled him and said, "Captain! Captain! Won't you please stop the ship for just a minute? I dropped my apple overboard."

Now, that analogy won't bear too close scrutiny, of course. Our business is a lot more than an apple, but at the same time we have to remember that the only justification for what we are doing is the fact that we are doing it better than anyone else has so far; that is, we are filling a real need of society and doing it fairly well. Now, if the government can do what we are doing and make a better job out of it, all things considered, the social and economic and political good of the world considered—if they can do a better job than we can, then the government ought to do it, and I think we would all recognize that any opposition to their doing it would be purely personal and selfish on our own part. That is, provided they can do it better than private industry is doing it.

Now, back to the function of this discussion group again. We are trying today to get a joint discussion on this matter, a joint

searching for truth, or the nearest to truth on this particular question that we are able to evolve from our present standpoint of experience and reasoning. The audience, in other words, every one of you sitting out there, has a very definite part in that. The speakers are going to present their own personal viewpoints to some extent, present, perhaps, a few facts, not very many statistics, I am sure, and then it is up to you to analyze what we say and to raise some questions on it, criticize it, bring it together and coordinate the different ideas that are brought out, perhaps, make your own suggestions and, perhaps as a net result of the whole thing, we may get some ideas we didn't have before. We may perhaps have evolved a line of thought on this particular problem that we haven't had before. If so, then this discussion group will have been worth while.

If we just get up here and ventilate our own sentiments, all feeling the same way, it is so much time wasted.

Now, I am supposed to take about 20 minutes, they tell me, to start this thing because it is the function of the first speaker in a discussion group, ordinarily, to more or less sketch out the groundwork of the discussion, that is, to indicate the general scope of it. I am not going to define the terms in too much detail. The general subject is the Insurance Aspects of Social Legislation. By insurance aspects, we don't mean necessarily the degree to which social legislation partakes of the nature of insurance, or any of the actuarial problems that are involved, perhaps, although that is entirely appropriate in the discussion, but rather we are thinking of the aspects of social legislation, which are interesting to the insurance industry, or to us more specifically. That is, its effect first of all on the country as a whole, economically, politically, socially and then secondly, and only secondly, its effect upon the insurance industry.

By social legislation, I think we will all agree that we are more concerned with the proposed legislation rather than the present. It wouldn't be a mistake to talk about it, but it is not a particularly debatable question whether we should have Old Age Benefits and Unemployment Insurance. It used to be, but we have it now and it is a case of going along with it unless someone wanted to make a determined effort to get rid of it. I haven't seen any particular sentiment in that regard, though. It is mostly a criticism of its extent and scope and trend rather than of the fundamental fact of Social Security as we have it so far.

The proposed legislation is represented chiefly by the Beveridge Plan, and right now by the new Wagner Bill that has been introduced. You always have to say the New Wagner Bill. He has one, it seems, almost every session along this general topic. This time it is Senate Bill 1161.

Suppose I just briefly sketch out the provisions of that Bill? Some of us may not have plowed through the whole thing and others may have, but it won't be amiss to sketch it in very brief detail.

There are four main points I will take up in regard to it. The first is the unemployment insurance end of it. Senator Wagner proposes that we abandon our state systems of unemployment insurance and have a federalized system. I suppose if you asked for the reason why, it would be back to the old plea that it can be done so much more efficiently under one government. The plea is raised for so many different forms of legislation that come up. It doesn't stand too careful examination, because it is only one factor of a great many. If it can be done so much more efficiently under one government and should be so done, the same thing can be said of almost every function of a state government.

The opposing fact, which we know often prevails, is the fact that the very character of the particular activity can best be administered by a local organization, in touch with the local needs of that particular community.

The benefits of unemployment insurance, Senator Wagner proposes to increase until now someone will be able to get up to $30.00 a week for not working. The duration of the benefits would be extended to 26 weeks and possibly as long as 52 weeks. In other words, a full year.

The waiting period would be shortened to one week. The coverage would be extended to agricultural workers, seamen, domestic servants and employees of non-profit institutions.

We are not so much concerned, I suppose, most of us, with the extension of the coverage of unemployment insurance. If the system is fundamental, if it is administered properly, if it is a good, sound state system and working all right, if it is good for a man who works in a store, it should be good

for a nurse or a maid or a cook or a domestic servant or for a man who is working on a boat instead of on the pier next to the boat; but we do want to analyze to be careful that it is soundly and safely administered as it goes along.

The second main point is the old age benefits. The maximum benefits, as you know, right now are $85.00 a month under the Social Security Act. Senator Wagner proposes to increase that to $120.00 a month, increasing also the minimum benefits and the intermediate benefits. Women of 60 would be eligible for benefits instead of 65, as it is now. Coverage extended to the same group that I just mentioned, except seamen, and also to the self-employed.

I am happy to notice that Senator Wagner doesn't suggest that the unemployment insurance be extended also to the self-employed, because that is a tremendous administrative problem.

The third main point is, you might call it compulsory health insurance. That wasn't in the Elliott Bill that was considered by Congress last year but it is in Senator Wagner's Bill. Everyone who is under the old age plan would be under this compulsory health insurance plan, and their wives and their children would be under it.

The risk that is insured against is disability from any cause, illness or sickness, including a 12 weeks' benefit for maternity. Permanent disability would be treated the same as old age. In other words, it would be considered as premature superannuation, if you want to put it that way. The benefits would be cash for the wage earners. That is, they would receive unemployment insurance in spite of the fact they were unable to work. In other words, if their inability to work came from a physical disability and not from an inability to find work, they would receive unemployment insurance.

Non-wage earners, it would seem to me from glancing through this Bill, would get medical care and hospitalization benefits. They wouldn't get paid, however, if workmen's compensation were being paid. It is not intended to be in addition to that.

The taxes, the fourth and last point under the Wagner Act, not the least important, however, are 12 per cent of the payroll, 6 per cent from the employee, 6 per cent from the employer. In the case of the self-employed, it would be 7 per cent of the market value of the services rendered up to the first $3,000.

That 12 per cent tax, as many of you will remember, is the same tax that was proposed under the Elliott Bill last year. The main difference, I will say, between the Elliott Bill and this is that the Elliott Bill didn't propose health insurance at all, which is generally considered to be an extremely expensixe form of social legislation. Senator Wagner is going to do everything that Senator Elliott was going to do, or Representative Elliott was going to do, and then throw in health insurance for good measure, without charging any more for it.

I am afraid that is typical of a good deal of the thinking that has been done on this social legislation. If the end looks desirable, their feeling is, "Plunge ahead and do it. We'll find out how as we go along." It doesn't always work that way. You cannot run a company that way; you cannot meet a payroll that way, and I am afraid they are going to find out you cannot run a government that way. We have to use some intelligence, some scientific planning on these matters.

Now, that is just a very brief outline of the Wagner Bill. There are a few fundamental considerations I just want to throw out very sketchily. We will probably discuss that sort of thing more in the open forum, afterwards, but a few points I would like to make, about five, to be specific.

The first one is that the corollary of freedom is independence. Now, the whole world today is locked in a gigantic struggle for freedom. The United Nations claim, and I think with good justification, that the real essence of their fight is to preserve individual freedom. The Totalitarian nations laugh at it. They admit quite frankly that individual freedom has no place in their order of things. They are so taken up with what they conceive to be the good of everyone, if you give them credit for good intentions — some of them, at least, may have them—they are so concerned with the good of everyone that they say that individual freedom must perish if it is in the way. In other words, if social objectives are desirable enough, the means of achieving them are of no particular importance.

Now, that is an important point to see, because that is a fundamental difference in the reasoning on both sides of this armed camp in the world today. Unfortunately, I am afraid many of our social planners don't see that difference. They are struggling along with what really amounts to the same think-

ing and the same reasoning as the totalitarian states. In other words, if a broad general social objective is desirable enough, it doesn't matter how we achieve it; it doesn't matter what sacrifices we may be making in order to get it.

In regard to that, I just want to express my own opinion, and that is that anything which makes us more dependent on the government is bad. Now, that is the essence of all of these plans. They make us more and more and more dependent upon the government.

Another difference between the Allied nations, the United Nations, and the totalitarian powers in this war, if you just look at it, I think it is more than a coincidence that the nations which are the United Nations largely or essentially, the important ones, are nations which have gone out and pioneered, which have built and which have constructed. I think we are a typical example of that. In the United States we built this country, we pioneered it, we created it. The British Commonwealth of Nations largely can accept that same definition. England has certainly colonized a great part of the world. Australia is doing the same thing there that we did here. Canada is still in the same process. New Zealand, much the same way. Russia has probably done a great deal of pioneering, and we may disagree with her theories, her fundamental social concepts, but they are essentially a pioneering nation, that is, a nation with a tremendous country that they have to settle and develop and build as they go along. They have done a much better job on it than we ever realized until the last couple of years came along.

I think that the difference there between the pioneering spirit, the individualism, the individual thinking of the countries which are going out and building as opposed to the other countries, such as Germany and Italy, whose cry is, "Give us more living space. We are hemmed in, etc."—the difference there, you might phrase up by saying that they are concerned with a mass way of accomplishing their objective. In other words they do it through government. The totalitarian state proper, Fascism, Naziism, has for its essence the theory that if something is good, it should be done by the government.

We are just opposed to that and, in my mind, far more important than social security, however achieved, is spiritual security, and by spiritual security I mean the integrity, the self-reliance, the self-confidence that is born in people who are making their way in the world and who are not having everything paved for them by the government, by a rich father whose graces they don't know enough or are too weak willed to reject. But I do want to bring out that fundamental point, the difference between spiritual security and social security. Social security, if achieved at the expense of spiritual, moral security, doesn't do a bit of good. It does far more harm than good.

Let's examine a few motives that are behind this as our second general consideration, a few motives that underlie this social legislation in general. I think it is undeniable that many of the people interested in it are honestly, sincerely trying to provide against their own old age, their own unemployment or disability, and for others, but I am afraid that only too often it is the old human urge to get something for nothing. That is a promise which seems to be swaying many of the labor movements in that regard. They feel, particularly in this regard, that since the employer is going to pay half of this cost, at least, that that is half of the tax there that if they didn't pay, if the employer didn't pay for the benefits of labor, they would be keeping themselves. Consequently, labor is getting something it wouldn't get otherwise.

Of course, that loses sight of the fact that wage rates and wage increases depend fundamentally on the ability of the employer to give them. He can't give them with something he doesn't have. If he is not going to have anything left over, he is not going to be able to give them. It is a golden promise to labor, something for nothing, but labor finds out and is finding out, just as all the rest of us find out, that you don't get something for nothing. You have to earn what you get in this world.

Another motive, I am afraid, which underlies this is the tendency of bureaucracy to perpetuate itself. It is very rare, indeed, that you ever hear of a government bureau which recommends its own abolition. Now, that isn't entirely selfish. It is the people who are so close to the problem, they are working with it, they get so mixed up with it that they fundamentally believe themselves that it is very important, that they are doing a good work and that it should be extended. I am sure many of the sincere thinkers among the social planners feel that way about Social Security, but, nevertheless, it is that inherent

vice of government to perpetuate itself and to grow in a bureaucratic government.

The historical aspect of this is an important consideration, particularly when we look at the fact that, significantly enough, Germany was the first country to have compulsory health insurance. They had it 60 years ago. When somebody is trying to persuade us to adopt something new, one of the best ways we can do is to try to find somewhere else where it has been tried and is working and try to see just what their result has been.

Well, if we look at Germany, I am afraid we are going to be rather surprised. Dr. Peter Irving, the Secretary of the Medical Society of New York, is authority for the statement that the average recorded illness in Germany has practically doubled since sickness insurance was adopted. And I think we can all agree that paying cash benefits to people because they are sick doesn't tend to shorten the sickness, ordinarily, but rather it tends to prolong the sickness and the convalescence. Compulsory health insurance was characteristic of the totalitarian state. As far as its effect goes, I think about the chief effect you could say in Germany is that it has made the people more reliant on the government, less able, less inclined, perhaps, to resist the wrong trends of those in authority. If it grows out of a fundamental characteristic of the German thinking, the German national thinking—I don't know whether it does, but if it does, it certainly is a type of thinking that doesn't represent our concept of life.

A fourth fundamental consideration is that of cost, only too often just passed over very lightly. The estimates of cost on this sort of a plan vary from a minimum of eight billion dollars a year to perhaps fifteen billon dollars a year, and many higher estimates could possibly be made with good authority. Fifteen billion seems to be a pretty sound estimate of what this plan would cost.

It is a very real question whether this country can stand to have that much money taken out of business channels. It means just that much less opportunity to employ people, to build more enterprises. It does mean, too, that this cost will be spent twice. Under the Wagner Bill, as under the present Social Security Act, the only permissible investment for these funds that come in is government bonds. That means, of course, that when the Treasury issues that bond, the money goes into the treasury, to be used for the general expenses of the government, and is spent. Now, they couldn't afford to take that much currency or gold or capital goods out of our economy. It has to be spent over again by the government right now, and that means eventually, when this thing is due and the benefits are due to be paid out, they are represented by bonds, the bonds have to be discharged. In order to discharge the bonds, more taxes have to be levied, and we have ended up by paying two taxes for the same thing.

The fifth fundamental consideration I would like just to throw out is a thought which will come up, undoubtedly, more among the other speakers in the open discussion as the private alternatives to the government's doing this. I think it is significant that in voluntary hospital insurance we now have well over eleven million members. In private insurance, there are already about twenty-five million policies among those classes which would be covered by the government plan. I don't know whether the need is really quite as great for this sort of thing as the social planners would like to have us believe. They hold up many individual instances, they talk about the underprivileged masses of people. I don't know. I always get the idea, when they are talking about that, that their words are more applicable to the peasant classes of Europe than they are to the American people, to the American working man. There are too many of our American working men who have demonstrated their financial independence far enough to be able to have a little home, to be able to save up and get an automobile in normal times, to make me feel that there is quite as crying a need as the social planners would have us believe.

I think private industry is doing a pretty fair job. The accident and health industry has done a tremendous job, just since 1919, if you look at the growth in premiums, if you look at the growth in distribution of policies.

Now, those are just a few random comments intended to start this thing off. The other speakers as they follow along without any further introduction will bring out their own individual viewpoints on this and, again, if you have some questions, I wish I could invite your questions right now, but I think it would be more courteous to the other speakers if we waited until we are all through and then we start in and have some fun out of this.

DISCUSSION BY VICTOR C. GORTON

Over a great number of years, but especially within the past decade, we have witnessed a tremendous growth in recognition by government of its social responsibilities. Recently, the public has been, and is still being, gradually conditioned to acceptance of paying the costs entailed in fulfilling the obligations which government, either rightly or wrongly, has assumed.

No one will say that we are not now in the midst of a trend, the duration of which will determine the nature, extent and application of future, so-called social security laws. Whether the trend will continue at an accelerated pace to the point where government will assume liabilities now carried by liability insurers depends, I think, on many variables too great in number and too uncertain in effect to allow us to have very definite opinions. It may well be that the length of the war, the extent of regulation of civilian life, peace negotiations and similar matters will all cause an abrupt turnabout in the present trend toward endowing governmental bureaus with greater money paying powers under law.

On my part, I expect some reaction which will at least defer application of social insurance laws to the liability insurance business until some time in the somewhat distant future. The public mind has not yet appeared to have accepted the idea that one, as a member of the public, injured through his own fault should be permitted to recover for such injuries.

It is now over thirty years since the workmen's compensation laws did away with employers liability; yet this breach in the dyke of precedent did not widen to allow the elimination of legal liability in the third party tort feasor. There is, and will be, much litigation concerning such liability—particularly with respect to workmen injured in automobile accidents.

While the welfare of an injured member of the public was certainly of paramount concern in the enactment of automobile financial responsibility laws, (which may, in that respect, be termed social legislation), the most drastic of these laws, New York, New Hampshire, Indiana, Oregon and Michigan statutes, together with Massachusetts compulsory insurance statute—do not contemplate the elimination of legal responsibility of the automobile owner or operator, but rather intend only that the prospect of collection of claims or judgment be greatly increased.

Hence, it is my opinion, that laws of this type and near term future laws of social insurance character, will not eliminate liability as a basis for collection of the amounts necessary to make whole those persons who have been injured. And, when liability still exists, there will still be need for the lawyer.

But it may well be that the passing of the present generation will see the passing of present type adjudication of liability by the courts. Government administrative bodies, similar to the numerous bureaucratic agencies now existing, may usurp this function. Disregarding for a moment the cost of such administration, the function of boards established to adjudicate questions of liability amounts fixed and limited under statute may enhance the social welfare of the various communities by giving more expert attention to such matters than is presently accorded by the jury, the lawyer and the adjuster. This may be too much to hope for, in that we have no reason to expect that such bureaus will be free from political entanglements.

If the government is to assume such responsibilities, such added authority will come gradually and, it seems to me, that the logical step in this gradual evolution will be that in perhaps twenty years from now the characteristic of the workmen's compensation plan may be adopted to the prospect of compensating persons of the general public injured in automobile accidents. But there are so many difficulties to be met and conquered before such a plan can be successfully administered, that I do not think the abilities of persons now charged with governmental authority—persons who are now confronted with critical questions concerning both the home and the war front—are sufficient to effectively dispose of the most elementary problems involved.

Where full payment as a matter of right is received from government for medical and hospital expenses and for financial loss from disability, total or partial, temporary or permanent, there seems little left for which to bring a damage suit except pain and suffering. Certainly the payment of the other items would take all the insurance money or tax money collectible. Then, the logical next step would be the abolishment of any legal liability for damages for bodily injury, because society, even if it could stand the cost of limited compensation for injury, could not

stand the double cost of liability on top of such payments, unless intensified and successful safety programs greatly reduce the number of those injured or killed in accidents in proportion to wheels rolling.

Therefore, it is my conclusion that if the government's social insurance program will "take over" the present function of liability insurers, such happening will occur in the distant future. Even after such occurrence, there will be a distinct need for the services of competent attorneys whose work will then be very similar to much of the work they are now doing—the chief difference being a substitution of clients. The play, or the game, with changes in rules and parties, will still go on.

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DISCUSSION BY C. O. PAULEY

I am engaged in the business of Life, Accident and Health Insurance, and if I am to be governed by the standards prevailing in Washington, any ideas I might have with regard to social insurance should be disregarded because of personal interest, and any knowledge I may have acquired by experience over the last forty years should be ignored. Let me make it clear, at the beginning, that any views I may express with regard to compulsory government insurance are not based upon any unfavorable effect that it might have upon my business, but are founded solely upon the effect which I believe such a program as proposed by Sir William Beveridge or the Wagner Bill will have upon our economic, social and political future. If compulsory insurance is a good thing for the American people, it would be just as foolish for private insurance to oppose its development as it is for employers and labor to oppose the use of labor-saving machines. No one business or industry can, or should, stand in the way of the welfare of the whole people.

I must have the type of mind that in these days would be classed as reactionary, for when any program of this type is suggested, I instinctively ask, "What is it going to cost?" While Sir William Beveridge does make a very detailed estimate of the cost of his program in England, our own social planners dismiss the question of cost with a mere wave of the hand. The National Resources Planning Board, in discussing its social security recommendations, says, "We have passed the stage when financing the program need be more than a technical problem. If we measure the physical and intellectual statute of our people and our vast national resources, financial problems need be of no hindrance. Their complexity need not stand in our way. We require only the will and the courage to make full use of our national resources." It is difficult to reduce the cost of the Beveridge Plan to the cost of a similar plan in the United States because of the great difference in conditions and the higher cost of living. The Beveridge Plan provides for a mere subsistence level of benefits. It has been estimated by very competent research men that a similar proposal giving a subsistence level of benefits would cost the United States approximately 15 billion dollars per year.

The proposals of the National Resources Planning Board, the Social Security Board, and the Wagner Bill are based upon an entirely different theory and within certain upper and lower limits, the benefits are determined by the income upon which an individual and his employer have paid taxes, or, as the Wagner Bill puts it, "have paid contributions." Except for the Wagner Bill's proposed contributions of 12 per cent of payrolls and 7 per cent of the market value of the services of the self-employed, and similar vague statements of percentages from Secretary of Labor Perkins and the members of the Social Security Board, we have no estimate of the cost of the proposed social security plan for this country. The Social Security Board has a Bureau of Research and Statistics employing 120 people and costing $258,000 in salaries and traveling expenses during the last fiscal year, but if they have issued any detailed discussion of costs such as was prepared by the Actuary of the British Government as a part of the Beveridge Plan, it has not come to my attention. During the last fiscal year, the 2 per cent on wages for Old Age and Survivorship insurance amounted to 895.6 millions. It is estimated that for the fiscal year just ending this will run considerably over one billion dollars. On that basis, the 12 per cent tax proposed in the Wagner Bill would produce revenue in excess of 6 billion dollars from those under the present Act. In addition to this, it is proposed to bring under the Act many employed persons not now covered, and to place a tax of 7 per cent upon all of the self-employed, numbering 20 to 25 million. This is not all of our social insurance program, however, because the railroad employees of the country, 2 million in number, have a separate Board

and insurance system of their own. Neither does it include federal, state and municipal employees, estimated at 6.5 million, most of whom are now covered under some retirement fund and other insurance benefits, and will eventually be included in any federal plan. I think it is perfectly safe to conclude that if the Wagner Bill were enacted into law, the initial tax under all of these programs would exceed 10 billion dollars annually. This is only at the beginning of the program, however. Eventually the most costly part of the program will be the Old Age and Survivorship insurance, the cost of which will finally be an additional 5 billion dollars per year or more.

Neither the Beveridge Plan nor the Wagner Bill attempt to assume the full burden of old age annuities at the beginning. Just why they assume that this added burden can be absorbed after 20 or 25 years is not explained. Not only will practically all of our population over 65 then be eligible for old age annuities but by that time the proportion of our population which is over 65 will have greatly increased. I think a conservative estimate is that when our present Old Age and Survivorship insurance is in full operation, assuming there is no increase in benefits, it alone will cost 12 per cent of the payrolls. The Wagner Bill assumes 3 per cent for medical and hospital care, and 5 per cent for unemployment and disability benefits. Both of these assumptions I believe to be too low. But in any event, the minimum cost when the program is in full operation would be 20 per cent of payrolls of employees and self-employed up to $3,000 per year.

The nation, like an individual, has just so much money to spend, all of which must come from the labors and enterprise of its people. If we want a social security program of this magnitude more than we want other things, perhaps we can have it. In considering this program, however, we must bear in mind that there are certain other obligations which must come first. When this war is over, we shall probably have a national debt of 300 billion dollars or more. If we assume the interest on this debt is only 2 per cent, and it is amortized over a period of 50 years, it will take 9.5 billions a year in taxes. We must finance the rehabilitation of the most of the world after the war, and for a time must feed and clothe millions outside our own borders. In yesterday's papers appeared a report of the Investment Bankers' Association in which it was estimated that our own industrial development would require 5 billions a year for the first three years after the war. Our people want a constantly improved and extended system of education, we want more parks and recreational facilities, we want a great many things which are not in themselves productive, and in addition, we must support the vast number of municipal, state and federal employees, and the costs of the services which we hope they will render us. All of this must be supported by free enterprise. You can take only so much in the way of taxes or contributions from the results of free enterprise without "killing the goose that lays the golden egg." Can our free economy, in addition to all the other burdens it must carry, support a compulsory government insurance scheme which will impose a tax of 20 per cent or more on payrolls and take 15 to 20 billions from the earnings of those who work and produce and re-distribute it to those who do not work and who are not productive?

If we embark on a social insurance scheme, the cost of which proves to be too great for our national economy to sustain, just one of two things will happen—either the actual benefits will be reduced by an inflation which reduces the purchasing power of the dollar with all of its attendant evils, or, as is more probable, the failure of free enterprise to give full employment and to sustain the social security burden will result in a demand that the government take over more and more of the functions now performed by private enterprise until we have a completely socialized economy.

But the cost will not be entirely economic. It is even more difficult to estimate the social costs in the short time allotted to me. I cannot go into detail with regard to all the social ramifications of such a program. What will be the effect upon the character and the enterprise of a generation which knows that from before its birth in a government hospital, until it is laid away in the grave, a benevolent governmental bureau will pay the costs of being born, the costs of its education, will supply its recreational needs, will furnish medical services and hospitalization in illness, provide an income during unemployment and sickness, and a pension if permanently disabled or retired by old age? What becomes of the incentive to rise above the conditions in which the individual is born? Will it not result in the rise of only a few who are born

with great inner driving power and an unusual ambition, while the great mass of our people settle down on a dead level of security such as prevails in most European countries? Is it not possible that we may over-reach ourselves in our efforts to give every man complete freedom from want and from fear without any responsibility on his part? It was the desire to achieve freedom from fear and from want for themselves and their families which urged men on from our Eastern Coast to settle the wilderness and the prairies and has made our nation what it is today. Perhaps the striving for the goal has been and is more important in the life of a nation than the goal itself.

Compulsory social insurance will also have its political costs. Here again I can only touch one phase of the subject. During the last quarter of a century, the federal government has been increasing its powers and its functions at a rapid rate. Out of this has grown a bureaucracy which is increasing at an amazing rate. It is not wholly a product of the present administration, but its growth during the past decade has been tremendously accelerated. I think few of us realize the danger involved in this rapid growth of bureaucracy. It is not confined to Washington but is spreading all over the country. The State of Ohio has 25,000 state employees. There are 90,000 federal employees in the state. Massachusetts has 21,000 state employees. There are 129,000 federal employees in the state. Pennsylvania has 44,500 state employees and there are 215,000 federal employees in the state. Wyoming operates its state government with 1,100 state government employees, but there are 6,200 federal employees in that state. This does not include the armed forces. In addition to all of these various governmental bureaus, each vying with another for an increase in its importance, the amount of money it can spend, and the number of people it can employ, we have more recently developed hundreds of governmental corporations, some of which are not even audited by the Treasury or any other governmental department. The American bureaucrat seems to have a peculiar genius for hiring additional employees. The OPA has 2,700 lawyers. England which has a price control organization similar to the OPA has managed to struggle along successfully with just 10 members of the legal profession. I am indebted to Senator Harry F. Byrd of Virginia for these facts and figures, and he calls this growing bureaucracy a Frankenstein Monster. But our existing bureaus will be completely over-shadowed by a bureau which will be necessary to administer a social security system such as is contained in the Wagner Bill. The Social Security Agency has over 31,000 employees and already the Social Security Board has over 13,000 employees, which does not include the unemployment compensation administered by the states. The greater part of these employees are engaged in administering the Old Age and Survivorship insurance, which paid beneficiaries only 110 million dollars in the last fiscal year. The Wagner Bill would empower the Social Security Board to take over the state unemployment agencies, to put on a system of benefits for total and permanent disability, temporary disability and hospital and medical care. This would necessitate a federal bureau with representatives in every city, village and hamlet in the country who would go into every city and farm home. I do not need to point out the political implications of such a bureau upon the tender ministrations of which every individual would at one time or another during his lifetime be dependent.

I have never been very much afraid we would lose our liberties to a "man on horseback." At worst, that would be only a passing phase, dependent upon the health and life of one man. But bureaucrats go on forever. Change of administrations may impede their advance for a time, but their steady progress to more and bigger and better bureaus, and more bureaucrats, goes steadily on. If we lose our liberties, it will be to millions of federal employees who more and more are regulating our individual lives and curtailing our individual freedom. The American people are just beginning to sense the danger in this vast governmental organization. Will they be aroused in time to prevent its getting a strangle-hold upon us?

You may say, as they told me down in Washington at the Social Security Board, "You don't want the Government to do anything." I do want the Government to do everything that cannot be done by private enterprise or that it can do better than private enterprise, and which will not impede or destroy private enterprise. Impelled by the economic and political pressure of the early 1930's, we embarked upon a system of compulsory government insurance limited to old age annuities, benefits for surviving widows and children and unemployment compen-

sation. These have operated only during a period of increasing employment. They have not existed long enough to prove themselves or to indicate what their ultimate effect upon our economy will be. How will they operate in a time of depression? I believe they should be given time enough to prove themselves before venturing upon the much more difficult and costly fields of disability, medical care and hospitalization. I believe in social security, but I want to see it achieved by the efforts of the individual as far as possible by his own initiative. I believe the government has a great place in such a program. Any system of social security, private or public, is based upon nearly complete employment. Even Sir William Beveridge assumes that no system of social insurance can survive prolonged mass unemployment. The government should bend every effort to prevent periods of mass unemployment in private enterprise and to make possible at all times profitable employment in private enterprise for all but a small proportion of its employables. We have made only a small beginning in conservation of health and the prevention of preventable diseases. The expenditures of the government for health conservation and the elimination of communicable and other preventable diseases should be greatly expanded. The governmental efforts should be directed primarily at the causes of unemployment, accidents and disease, and to the rehabilitation of those who have become impaired. In my conception, the efforts of government should be addressed primarily to the underlying causes of unemployment and disability, rather than placing the emphasis upon paying its citizens for being unemployed or sick. It should encourage its citizens to provide against such contingencies by education, by savings, by insurance and all other means available; and should provide for those whose needs are inevitable by a judicious system of public assistance, rather than fasten upon the whole American people a vast compulsory social insurance program administered by an every-growing bureaucracy.

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DISCUSSION BY HAROLD GORDON

If you gentlemen have been watching us up here at the table, you noticed Mr. McGugin and I making some notes. We were simply scratching out of our notes the points that were brought out by the previous speakers and I am going to have a great deal of sympathy for Mr. McGugin when he gets up, because a great many of the points have already been covered. As a matter of fact, when I first prepared some notations, I wanted to cover some of those that I felt dead certain wouldn't be covered by at least Mr. Pauley, whom I knew pretty well, and Mr. Peterson and Mr. Gorton, so I have decided to discuss very briefly just two aspects of this subject, one having to do with the possibility of obtaining a clearer meaning or more definite understanding of some of the terms that we use in connection with social security and allied topics, and also, if I can, to introduce a little propaganda or put in a plug for the accident and health business, because I think it is doing a swell job, and it is under direct attack now through these proposals for the expansion of the Social Security Act.

The science of semantics may be said to be a search or a study of the meaning of words. Now, if you were asked to define a chair or a dog or a hotel or something of that nature, you might have little difficulty, or the layman might have little difficulty; but when we go into the field of social science, social reform, and we come across the words "liberty" and "democracy" and "justice" and "communism," etc., we find that there are different meanings, and in no field of present-day thinking has it become more important to clearly define and distinguish between labels or words used to designate some of the proposals for social reform than those dealing with social security and social insurance. It is with the hope of perhaps finding some common ground or some common basis for this discussion that I am going to discuss five or six certain labels used in this topic. For instance, Social Security, Social Insurance, Private Insurance or Public Insurance, Social Needs and those terms that are found most often in the Beveridge report, the terms "Want" and "Subsistence."

First of all, what is Social Security? Social security is often confused with the term "Social Insurance." I think the best example of that is our present Social Security Act. We often refer to that as a Social Insurance Act. I will have to hand it to those on that Economic Committee for Social Security back in 1933 and 1934 when they were drafting our present Social Security Act for picking up the term Social Security, because it is a good one. But it is not social insurance.

If you were to go down on the corner of

State and Madison and ask the first ten persons that you met on the street what they understood by the term "Social Security," I am sure you would obtain ten different definitions or interpretations. It means one thing to one individual in a certain classification of life and another to another one.

Sir William Beveridge in his report has defined social security as follows:

"The term 'social security' is used here to denote the securing of an income to take the place of earnings when they are interrupted by unemployment, sickness or accident, to provide for retirement through age, to provide against loss of support by the death of another person, and to meet exceptional expenditures, such as those connected with birth, death and marriage."

Now, our present Social Security Act proposes to cover only three hazards. First of all, it covers public assistance, aid for the crippled, the blind, etc. Then it covers the hazard of old age, premature death, or not premature death but just simply old age, and unemployment.

If you have read Stuart Chase's, "The Tyranny of Words," you have found that he suggests as a definition, not of social security but of the best that can be held in life, which perhaps many of us think of as social security, that the average individual "wants for himself and his fellows a good job, good food, a good house to live in, a car, and a chance to send children to high school or college."

Now, that perhaps might be said to be the average American's interpretation and definition of social security. Elsewhere, he also said that the essence of social security is both security and being comfortable. I think that is best illustrated by the fact that out here in Joliet, our state prison, we have thousands of people that are perfectly secure. They have social security, but they are not very comfortable. We have to have, in addition to being secure, some degree of being comfortable.

What is a good definition of social insurance and how does it differ from social security? About a year ago, not quite a year ago, I was asked to draft a little booklet showing some facts about social insurance, and one of the first things I tried to do was to obtain a good definition of social insurance. I wrote to the Social Security Board, to some individuals there whom I knew, and asked them for their definitions, and they defined it by defining what social insurance was not. I didn't get very far. So I wrote Dr. Blanchard, Professor of Insurance at Columbia University and President of the Casuality Actuarial Society and asked him for a definition, and at that time he said, "I am preparing a paper on this subject for the annual meeting of the Casualty Actuarial Society in November and if you will wait, I will give you my definition, which I am going to include in that paper," and this is Professor Blanchard's definition, and it is particularly important because I think it shows or illustrates the vast field which many of the proponents of social insurance wish social insurance to encompass. Professor Blanchard's definition is that "Social insurance is any form of insurance in which the government goes beyond the regulation of practices and the dissemination of information. It may do so by compelling insurance, by shifting the cost, by subsidy, or by becoming itself an insurer. To the extent that it acts in any one of these directions, insurance becomes social insurance, and I should include within its scope compulsory automobile insurance, governmental schemes of war-risk insurance, governmental crop insurance, as well as the more commonly recognized workmen's compensation, unemployment, old age, and disability insurances. While I believe that this definition properly distinguishes between private and social insurance, it includes certain governmental activities insurancewise which are not generally thought of as 'social insurance' and which would be of minor interest to members of the Society. Our attention should be given primarily to those schemes of social insurance which are established or advocated to meet a broad social need, which aim to provide an adequate minimum income, and which are usually compulsory as to membership."

That is an insurance professor's definition of social insurance.

If I were to define social insurance—and I wanted to do so in this little pamphlet—I would simply say that social insurance was a plan seeking to distribute the expense or certain expenses that were occasioned by hazards related to the human being. Perhaps that isn't very clear but that is a simple definition. However, when we insurance men become involved in discussions with the Social Security Board and others over social insurance, we are more apt to find social insurance defined and limited in its application to a compulsory plan operated by the government.

So if you were to ask what is compulsory social insurance, adding the word "compulsory" there, you might say it would be "A plan operated by the government which, through compulsory taxes or contributions, as Mr. Pauley brought out that the advocates of compulsory health insurance or disability insurance are now recommending, using 'contributions' instead of 'taxes,' on wages and payrolls, seeks to distribute the expense of old age, unemployment, sickness and accident disability, medical and hospitai care, death, and related human hazards."

What about private insurance and public insurance? I don't much like the term "private insurance." I don't like the word "private." It sort of hooks up the idea of private insurance in which we are engaged as insurance companies, which would include stocks, mutuals, fraternals and all other forms of private insurance—it hooks up to the New Deal conception of capital and capitalistic management, but, nevertheless, the insurance which we sell, while it is social insurance, has to be labeled by some designation to differentiate it from government insurance or public insurance, and so Mr. Hirschfeld, the Research Director of the Insurance Economic Society, defined public and private insurance somewhat as follows:

"The difference between private and public insurance concerns not the principle but the execution of the principle. Private insurance is voluntary; public insurance, to be effective, must be compulsory. Having but its own resources to fall back on, private insurance is limited by the ability of its clients to set aside current income for future contingencies. Having as its potential reserve the resources of the entire nation, the government is restrained by no such consideration. Private insurance, therefore, is compelled to withdraw where the income, real or potential, of its prospective client makes it impossible to arrange an adequate provision for future liabilities. Proceeding on different economic concepts, it is evident that private and public insurance are not in the same category. Logically, public insurance should begin where private insurance, by reason of its natural limitations, cannot compete; that means where, actuarially speaking, the risk becomes uninsurable. Public insurance, then, approaches the character of public aid. There are other reasons why one should exercise care in comparisons. In calculating its cost of operating a system of insurance, the government does not have to allocate the charge of paying commissions, or of paying taxes. Moreover, it has the privilege of free postage and does not have to bear the cost of collecting the taxes which, as in the case of our present old age and survivors insurance system, is borne by the employer.

"Inasmuch as private insurance aims to provide a budgeting device, while public insurance tends more closely to the principle of extending aid, it could be said that only the former is really insurance. Obviously, if a person were insured against unemployment, a subsidy or relief payment would be an effective means of keeping him from starving—but it would be a poor means of assuring him that in the future he will be better able to withstand a period of economic depression. Vocational training, the acquisition of a special skill, instruction in the art of saving and budgeting, education in regard to nutrition and hygiene, and similar measures would carry out more effectively the idea of 'assurance'."

Now, what about social needs? Obviously, if there had never been a need for social insurance, it probably never would have been agitated. I doubt, however, whether just social need itself has been responsible for the institution of social insurance, particularly in other countries.

Back in 1887, when Bismarck enacted the first social security act, there was another factor besides a social need. If a man is starving, if he has been sick and his family is starving because he is sick and unable to work, if a man has been unemployed for a year and has used up his savings and is in need of aid, there is definitely a social need. Now, social needs existed back in 1887 when the German social insurance system was instituted. It existed in England in 1912 when Lloyd George enacted the National Health Insurance Act, and it has existed here in this country, particularly back in the depression of the thirties.

However, in foreign countries, in addition to social needs, we have had the desire of the party in power, Bismarck and Lloyd George, of offering a sop or a subsidy to those people who would be the recipients of the social insurance, and we had the probability that much of the social insurance legislation enacted in those days was enacted, not just solely because of social need, but because of political expediency; and I am afraid that factor enters into a calculation or at least a

desire on the part of some of our proponents of social insurance even at the present time.

In discussing these social needs, there may be said to be three classifications or basic types of social needs:

(1) The permanent need for outside assistance, that is, public assistance, which we now have to some extent under the Social Security Act, which is found among the comparatively small group of the congenitally poor, the crippled, the diseased and the unfortunate. People have bad luck. They become sick and there is a permanent need there. They have never worked to any great extent, they have never accumulated any savings and we have to take care of them, and we are going to take care of them and we are taking care of those people right now under the Public Assistance Section of the Social Security Act.

Then we have the need of those who are temporarily dislocated as a result of seasonal influences, industrial changes, crop failures or other local factors. This need is often limited in duration and in geographical extent.

And, third, we have the need of large numbers of people who lost jobs as well as savings during the nation-wide depression such as occured in the early thirties.

Now, the first two of these needs I do not believe can be taken care of by insurance. I come back to that old theory that public assistance is not insurance, that none of those people who are permanently in need of some kind of aid, or even temporarily in need of some kind of aid, can be taken care of by insurance. It is a case of public assistance.

Then, in discussing these needs, we come to the question of whether there is a demand for social insurance at the present time, and I am confining my remarks now to the demand for disability coverage evidenced in the new Wagner Bill, which proposes to extend the Social Security Act to include both permanent and temporary disability. Now, we think we in the accident and health business are doing a pretty fair job. I have been in this business for 21 years and since that time, the number of policyholders and the volume of business has not just doubled and it hasn't just trebled, but it has almost quadrupled, both in volume and in number of policyholders. In the accident and health business today we are insuring well over 25,000,000 persons. Most of those are wage earners. In the Life field, the Life companies, as you know, are taking care of the life insurance needs of more than 65,000,000 people. In addition to that, they have insured through their permanent and total disability coverage over 5,000,000 people.

Workmen's Compensation is a line of accident and health insurance. It covers industrial accidents. Under Workmen's Compensation there are approximately 30,000,000 workers covered.

Our cooperative associations, trade, labor unions, mutual benefit associations, employee benefit associations, take in at least another 3,500,000 people.

The various hospital service and medical service organizations which have come into being in the last five or six or ten years are now insuring for hospital service and some forms of medical care over 11,000,000 persons.

Then, I wonder if we could ever estimate—and I can't do it—the number of persons, wage earners, who have a salary continuation plan, which, obviously, can't be called insurance but which serves the purpose of providing for that person, that wage earner, a continuation of the salary which he is earning when he is sick.

I know that many insurance companies and many industrial concerns not having group insurance in force, possibly, group accident and health, have a definite schedule of benefits, so that after an employee has been employed by a firm for a certain period of time, their salary continues when sick or disabled.

Now, all of those forms of accident and health coverage probably insure eight or nine out of each ten persons now gainfully employed. In other words, out of 55,000,000 wage earners at the present time, I think undoubtedly one or more of those forms to some extent are insuring in excess of 40,000,000 or 45,000,000 wage earners and, in addition, many forms of group insurance, of course, group accident and health, insure their dependents.

Now, last, the terms "Want" and "Subsistence." You found that in the report of the National Resources Planning Board, which, by the way, has had, as a reward for its efforts in drafting that report, its discontinuance, its elimination. You probably have read of the action of the Joint Conference Committee of the House and Senate in voting to appropriate $50,000 for such expense as had been incurred, and that means

the end of the National Resources Planning Board for the time being, but Mr. Grattan, in discussing the Beveridge report in a recent issue of Harper's Magazine, said this: "There are two key words in this Beveridge Report. These are the words 'Want' and 'Subsistence.' The report proposes to eliminate want by guaranteeing subsistence to all, largely but not wholly on an insurance basis. In short, practically all citizens will buy with small fixed contributions a guarantee that whatever bad luck may overtake them, unemployment, sickness, too heavy family responsibilities in relation to income—they will at least get a basic minimum of necessities. There is nothing in the report to warrant the statement that Sir William has a scheme to eliminate poverty. People remain in poverty long after they climb well above the subsistence level. Sir William is well aware of this, for he makes it quite plain when he discusses the problem of how large the allowance should be under his scheme. These allowances, he says, effect a socially desirable redistribution of existing national income. They do not create wealth, the basic necessity if poverty is to be eliminated.

Sir William is no flaming optimist. He wants to guarantee subsistence, but he cannot see his way clear to eliminating poverty, though he does allow himself the Laskian luxury of saying, "The scheme proposed here is in some ways a revolution, but in more important ways it is a natural development from the past. It is a British revolution."

What is want? Want is not an equivalent word for poverty. It is a condition at the bottom of the towering structure of poverty. Sir William defines it as lack of a sufficient volume of food, clothing, shelter and medical attention available to single persons and families to meet the mimimum standards necessary to physical survival. He correctly insists that the chief cause of want is lack of income—lack of jobs at decent wages. Other contributing factors of great importance are Disease, Ignorance, Squalor, and Idleness. The beneficiaries of his scheme will still suffer great evils. They may still be ignorant, still suffer squalor, and still endure idleness. They will still be poor. But they will not, he insists, suffer want. They will be kept alive. They will get a mimimum, restricted dietary, minimum bodily covering, a roof over their heads, and enough medical attention to keep them going as functioning human beings. If they have less than these, they will be in want. They can have all of them and still be in the meanest poverty.

It is folly to distort Sir William's purpose by loosely alleging that he proposes to eliminate poverty. He is merely hell-bent after Want. What is subsistence? It has already been partly defined in discussing want. It is the irreducible minimum of supplies of the essentials without which human beings cannot live as human beings in presentday society —simply that and nothing more. That subsistence is his basic objective becomes clear when we consider Sir William's rationale of the social services.

If we consider the two terms separately, we will say that here in the United States the recent proposals involving social insurance have been heralded as a solution to the problem of want by the Social Security Act, and particularly the recent Wagner Bill has been erroneously labeled as subsistence social security.

* * *

DISCUSSION BY DAN E. McGUGIN

An Englishman has written:

"O, won't it be wonderful after the war!
There won't be no rich and there won't be no poor.
We'll all have a pension about twenty-four,
And we won't have to work if we find it a bore.
There won't be no sick and there won't be no sore;
The beer will be thicker and quicker and more.
But there's only one avenue I'd like to explore:
Why didn't we hold this 'ere war before."

ECONOMIC ASPECT

The economic aspect of expanded social security is predominately a question of how much will it cost. Taking first the Beveridge Plan, we find the modest estimate of a cost in 1945 of only $2,788,000,000.00 which adds one billion dollars to the cost of the Social Security System now in effect in Britain. However, that is a very conservative estimate of Mr. Beveridge, himself, the estimates of our leading economists ranging generally in excess of three billions of dollars. Significantly, this low figure is based upon Mr. Beveridge's assumption that there will be universal employment after the war.

If Mr. Beveridge can guarantee universal employment then there is little need for his

plan. Recently a leading English Insurance Journal, pointed out that this is "window-dressing" which "would be natural in a politician but goes ill with a man of Sir William's academical standing." In summation this able article states:

> "There is a big demand in Britain for a plan to prevent mass unemployment after the war. There is no demand for free burial. Sir William Beveridge is barking up the wrong tree. We are all in favor of Social Security and freedom from want. But there are two pre-requisities. First, the war must be won. Secondly, we must have a clear plan to prevent mass unemployment of young workers and demobilized service men. *And these two points must envisage a world of freemen, not slaves to the state.* Why should we conquer our enemy to install a British imitation of them."

Referring to the feasibility of his plan in this country, Sir William, himself, has stated:

> "You don't want anything exactly like my plan, but you do share our problem and you might find some solution."

The reasons he assigns are the geographic, historic and economic differences between the countries, and particularly the much higher wages, standard of living and the needs of the working class in this country.

Turning now to the report of our National Resources Planning Board, the so-called Delano Plan, its nearest approach to an estimate of its cost is contained in these words:

> "We have passed the stage when 'the financing of the program' need be more than a technical problem. If we measure the physical and intellectual stature of our people and our vast national resources, financial problems need be of no hindrance. Their complexities need not stand in our way. We require only the will and the courage to make full use of our national resources."

That is no estimate of cost. It is a confession of a cost which must indeed be staggering if Uncle Fredric hesitates to suggest a figure when billions are spent with only passing interest.

Dr. Gerhard Hirschfeld, Research Director of the Insurance Economic Society of America, has conservatively estimated the minimum cost of the Delano Plan as the new Wagner Bill seeks to implement it, at more than 15 billion dollars per year. Since this figure is based upon analogy to the Beveridge Plan presumably it also presupposes universal employment. Since we are at present expanding less than four billion dollars per year in all our Social Security and Federal Aid projects, this is a minimum increase of almost 400 per cent per year. It is 15 per cent of the national income at its present war level.

Where would all this money come from? Mr. Beveridge very modestly estimates that no more than about 25 per cent could be collected from those insured, with 20 per cent or less from the employers, with the government footing some 55 per cent of the bill. But such a division is academic as it all comes from the taxpayer anyway.

We are now paying 2 per cent of payroll for old age benefits, 3 per cent for unemployment insurance, not less than 20 per cent for Victory and withholding taxes, with most of us buying war bonds with another 10 per cent, making a total of 40 per cent, plus numerous and heavy hidden taxes. If we add another 12 billions to public aid and social security costs, our net income for food, shelter and clothing dwindles alarmingly more.

But maybe some Utopian thinker would then espouse a plan of social security for the wage earner to enable him to subsist on his net income, after tax deductions.

Such ambitious programs once adopted, never remain static but must be constantly expanded to meet political demands. Therefore, if it is 15 billions per year at the start, eventually we may and probably will be paying two or three times that much.

An example of such expansion may well be drawn from the President's Budget Message to Congress of January 6, 1942 in which he espoused almost identically what the Delano Report contains. Our President suggested additional payroll deductions and contributions which would raise only four billion dollars. That is a far cry from the extra 12 billions the program would cost.

There is grave doubt whether our economy could survive this permanent, yearly withdrawal of 15 billion dollars from productive sources, and at the same time the curtailment or destruction of insurance companies. Their hundreds of thousands of employees and agents would be dislocated and industry as well as government would be forced to seek elsewhere an important portion of their financing.

The government sets up no real reserves, spending now and passing on to the future taxpayer the burden of paying future bene-

fits. If a later depression economy was unable to yield enough for this extra curricular activity we would be confronted with serious dissension, insolvency or both.

Then too, government in business is notably inefficient, reducing benefits per dollar spent. Administration of our present social security eats up 24 cents of every dollar.

SOCIAL ASPECTS

The social aspects represent the maximum of Utopian dreamland. In an article last November, Chairman Altmeyer of the Social Security Board urges that new types of protection should be added for permanently disabled workers, for temporarily disabled workers and their dependents, and for hospitalization. Dr. Hirschfeld identifies these groups more explicitly as follows:

1. "The true social needs are of those who, regardless of good or bad times must depend upon outside help! The lame, the crippled, the unfortunate, the poor.
2. "One step up the ladder of social needs we find those people whose fortunes are temporarily upset and whose security is temporarily dislocated. . . .
3. "At the top of the ladder we find an enormous demand for social security in periods of profound depression. . . . It is at this point that the originally justified demand for social help turns into a vast political issue."

Which is more important: Freedom from Want or Freedom of Opportunity? Mr. Herman A. Behrens, chairman of Continental Casualty Company, rather cogently points out:

"It is significant that this entire report has to do with freedom from want. I have yet to find in it a single reference to providing a freedom of opportunity. Therein lies the difference between the philosophical background of such a program in Britain and in America. . . Unrest among the workers (in Britain) due to more favorable conditions in the newer part of the world resulted in their being given from time to time certain concessions in the way of social insurance benefits. . . . It is this patchwork of concessions which the Beveridge report now attempts to weld into a consistent and a homogenous whole . . ." he says further:

"He (the British worker) would be glad to exchange all of the provisions of the Beveridge report and much more than these for the freedom from want of the American worker. . ."

It is therefore evident that while conditions in the two countries are vastly different our dreamers go far beyond true social needs and espouse what is really a dole to appease pressure groups and to offset their failure to be certain of a smoothly operating economy after the war providing employment for demobilized soldiers.

Mr. John Sharp Williams III, able Commissioner of Insurance for Mississippi, delivered a stinging rebuke to the Delano Plan at the recent meeting in Boston of the State Commissioners. He said in part: "This so-called security from the cradle to the grave is something which in my opinion should be the last thing a country built upon the individual initiative would want. In the first place there is no such thing as absolute security. In the second, such a program would tend first to destroy—incentive—and when incentive is destroyed it would take with it — initiative . . . In the absence of incentive and initiative, there can be no progress.

Mr. Delano shows his trend of thinking in his second report as follows:

> "We have got to provide through planning a means for sustaining the American concept of living, for full employment, security, and the pursuit of happiness, and for giving a reasonable assurance to our people and to other people that the Four Freedoms and the new Bill of Rights will be implemented and made real for all persons 'everywhere in the world'."

Ralph Robey, able business analyst of Newsweek calls this "nothing but economic Fascism."

THE POLITICAL ASPECTS

The political aspects seem endless but perhaps four of the most important are:

1. The determination of the New Deal planners to socialize the insurance industry, acquiring control of its vast assets which they have long viewed with jealous eyes.

2. The raising of vast additional sums of money through a painless method.

3. Political appeal to low wage earners constituting the majority of voters through pretended benefits mainly at the expense of others, for perpetuating the New Deal in political power.

4. An unintended admission in anticipa-

tion, of being unable to keep our economy functioning followed the war so as to provide employment for all—particularly the returning service men — by this grandiose scheme to provide doles in place of wages.

The effects of such a plan are another definite step toward socialism with planned economy taking the place of individual initiative, incentive and opportunity. Presumably this is to implement the so-called "New Bill of Rights" with a determined attitude on the part of the administration to save American Freedom even though it is necessary to kill it.

This is another encroachment upon States rights. My friend, James McCormick, Commissioner of Insurance for Tennessee, in a recent article very cogently points out the extent to which private insurance companies have proven an economic bulwark during the war and points out the health and growth of the insurance industry under state supervision. He warns:

> "The correction of the problems caused by those unable to carry their own load should not cause us as a nation to mortgage hopelessly the private initiative of the much larger section of America that desires to earn its own living by the sweat of its brow." He then closes:
>
> "When our soldiers return from the war let them find America a nation dedicated to individual opportunity and as founded in Independence Hall. They left our shores to defend America as they knew it. On their return let them find it as they left it."

In his article of last November (for which I am indeed indebted), Chairman Altmeyer says:

> "The size of individual payments is geared to presumptive needs, so that they can be much more nearly in accord with the needs of those who suffer misfortune than is possible under a system of compulsory lending, under which repayments are determined by the individual amount lent. In other words, the fact that risks do not eventuate for all persons makes it possible to pay out considerably more to those for whom they do occur than would be possible under a compulsory savings plan. In both cases the group of participants as a whole may ultimately receive back the same aggregate amount, but the manner in which its total amount is distributed among the recipients differs."

Can that be other than another scheme to redistribute wealth?

CONCLUSION

Unless we want insurance companies destroyed, additional socialism, States Rights swept aside, a Fascist planned economy, strangling paternalism for the individual robbing him of his incentive and initiative, political leverage so great as to make the present administration self-perpetuating, prospects of government taking over all industry, prospects of internal revolt or insolvency through inability to carry the burden, and the discard of fundamental American principles, we must fight this unwholesome plan.

But we must not fight blindly nor selfishly which would furnish ammunition to our enemies and be a disservice to our cause.

We must welcome relief for the permanently needy who are unable to help themselves.

We must expect changes and, expansion in our business—seeking not resisting them. He who delivers best the cheapest will get the business.

We must educate the public both as to what private insurance companies mean to the individual and the country and also to the staggering cost and regimentation of the Delano Plan.

The so-called "New Bill of Rights," must be amended by tempering it with American Fundamentals. *The Land O'Lakes News* expresses them thus:

1. You cannot bring about prosperity by discouraging thrift.
2. You cannot strengthen the weak by weakening the strong.
3. You cannot help small men by tearing down big men.
4. You cannot help the poor by destroying the rich.
5. You cannot lift the wage earner by pulling the wage payer down.
6. You cannot keep out of trouble by spending more than your income.
7. You cannot further the brotherhood of man by inciting class hatred.
8. You cannot establish sound security on borrowed money.
9. You cannot build character and courage by taking away a man's initiative and independence.
10. You cannot help men permanently by doing for them what they could and should do for themselves.

Jefferson was right—The best government is that which governs least.

OPEN FORUM

Practice And Procedure

Chairman: WILBUR E. BENOY, Attorney, 2910 A.I.U. Citadel, *Columbus, Ohio**

DISCUSSION LEADERS

LESLIE P. HEMRY
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Boston, Mass.

LON HOCKER, JR.
Attorney
St. Louis, Mo.

ROBERT P. HOBSON
Attorney
Louisville, Ky.

DAVID J. KADYK
Attorney
Chicago, Ill.

THE Open Forum Discussion on Practice and Procedure was called to order in the West Room of the Edgewater Beach Hotel, Chicago, Illinois, at 2:50 p. m., June 29, 1943. Mr. Wilbur E. Benoy of Columbus, Ohio, presiding.

CHAIRMAN BENOY: On the program, you will notice a discussion of Judgments. There was a recent case by the Supreme Court of the United States reversing a judgment of the Circuit Court of Appeals where they themselves raised the question of jurisdiction, which is illustrative of the fatality of Rule 59. In other words, it hadn't been disposed of yet in the court below but the court below kicked it up before the disposition was made. Consequently, they had to go to the Supreme Court of the United States on the remedy, and if there is anything I don't like to do, it is to charge my clients for fussing over the remedy. It requires just as much time as if you are going into substantive law.

This subject was given to David J. Kadyk of Chicago. They have lots of trial practice, including federal practice, and Mr. Kadyk is engaged in the trial of a case which makes it impossible for him to get away this afternoon, so he brought up his paper and I have asked Morris White to read it. Proceed, Mr. White.

* * *

Desirability of Amending the Federal Rules of Civil Procedure in Respect to the Time of Entry of Judgment

BY DAVID J. KADYK

It has been suggested that the Rules should be amended so as to provide that judgment should not be entered until those motions made after trial, such as a motion for judgment in accordance with a motion for a directed verdict under Rule 50(b) or for a new trial under Rule 59 or for amended findings under Rule 52(b) have been disposed of.

Under Rules 58 and 79(a) judgment is ordinarily entered at or shortly after the conclusion of the trial and before such motions are made. Rule 54(a) states that "Judgment" as used in the rules includes a decree and any order from which an appeal lies. The Rules, however, do not purport to affect the time for taking an appeal, which begins to run upon the entry of the judgment. Nor do they purport to specify the effect of such motions upon the running of the time for appeal.

It was a well recognized general rule that a judgment at law or decree in equity did not become final for the purpose of writ of error or appeal, as the case might be, where a motion for new trial or petition for rehearing was duly and seasonably filed, until the denial of such motion or petition, and hence the time for such writ of error or appeal did not begin to run until the date of such denial, *Morse* v. *United States,* 270 U. S. 151, 70 L. ed. 518-520; *Gypsy Oil Co. v. Escoe,* 275 U. S. 498, 72 L. ed. 393. It was also held that an order entered by the District Court upon its own motion during the term, reciting the need for an amendment of a decree and extending the term to a future day for the purpose of amending the decree had the effect of suspending the decree so that no appeal could be taken until it had been amended or confirmed, *Zimmern* v. *United States,* 298 U. S. 167, 80 L.ed. 1118. To have the effect of extending the time for appeal, however, it was frequently stated that the motion or petition must have been "entertained" by the court. *Kingman* v. *Western Manufacturing Co.,* 170 U. S. 675, 678, 42 L.ed. 1192, 1193. The word "entertain-

*Report of Practice and Procedure Committee by Wilbur E. Benoy, Chairman, Columbus, Ohio, appeared in the July, 1943 issue of Insurance Counsel Journal, Page 66.

ed" meant considered upon its merits, *Bowman* v. *Loperena*, 311 U. S. 262, 266, 85 L.ed. 177, 180; *Aspen Mining and Smelting Co. v. Billings*, 150 U. S. 31, 32, 36-37, 37 L.ed. 986, 988; *Texas and Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 489, 28 L.ed. 492, 493. The exact reason for and extent of the requirement, so often stated, that it must be "entertained" by the court, was not always made clear, and the lower courts found considerable difficulty in attempting to explain exactly what the Supreme Court meant. (See *Payne* v. *Garth*, 285 Fed. 301, 302, 309). Generally speaking, it may be said that the occasion for the requirement was the fact that during its term of court the lower court had jurisdiction to set aside or vacate its judgment or decree and hence to grant a motion for new trial or petition for rehearing but after the lapse of its term it lost jurisdiction over its judgment or decree unless it had "entertained" such a motion or petition which was held to thereby extend its jurisdiction over the judgment or decree until such motion or petition was disposed of. *Texas and Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 28 L.ed. 492, 493; *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31, 36-37, 37 L.ed. 986, 988; *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675, 678, 42 L.ed. 1192, 1193.

The requirement that the motion or petition be "entertained" in order to have the effect of extending the time for appeal until after its disposition applied where leave of court was necessary to file such motion or petition but not where there was an absolute right given by statute or rule of court to file it, provided it purported to raise questions of substance and not mere matters of form. Such I believe is the clear effect of the decisions. *Morse* v. *United States*, 270 U. S. 151, 153-154., 70 L.ed. 518, 519-520; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 420-421, 81 L.ed. 316, 318; *Pfister* v. *Finance Corp.*, 317 U. S. 144 p. 149 note 7, 87 L.ed. 123, 127. In this connection see *Ortiz* v. *Public* Service Commission, 108 F(2d) 815, 816-817, (CCA, 1st); *Sugg v. Mutual Ben. Health and Accident Assn.*, 115 F(2d) 80, 82 (CCA, 10th); *Denholm and McKay Co.* v. *Commissioner*, 132 F(2d) 243, 247-248 (CCA 1st); *Southland Industries* v. *Federal Communications* Com'n., 99 F(2d) 117, 120-121 (Ct. of App. for Dis. of Columbia). Thus where by court rule the right was given to file a motion for new trial but the rule provided that after the court had announced its decision upon such motion no other motion by the same party should be filed unless by leave of court, a second motion, though filed within the time required, did not suspend the time for appeal unless such second motion was "entertained" by the court, *Morse v. United States*, 270 U. S. 151, 153-154, 70 L.ed. 518-520; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 419-421, 81 L.ed. 316, 318. Likewise where a party filed, apparently as of right, a petition for rehearing in the Oklahoma Supreme Court which was overruled and a timely application for leave to file a second petition was granted but thereafter the application for leave to file it was denied, the second petition did not extend the time for petition for certiorari to the Supreme Court of the United States. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498-499, 72 L.ed. 393. The court there said:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States*, 270 U. S. 151, 153, 154, 70 L.ed. 518, 519, 520, 46 Sup. Ct. Rep. 241.
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> "If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

Leave of court is not necessary to file a motion for judgment in accordance with a motion for directed verdict under Rule 50(b) or a motion for amended findings or additional findings and amended judgment under Rule 52(b) within the 10-day period therein prescribed. Such motions may be filed as a matter of right. This is likewise true as to a motion for new trial under Rule 59 if, as provided in Rule 59(b), the motion is served not later than 10 days after the entry of judgment. A motion for new trial on the ground of newly discovered evidence may be made after the expiration of such period of 10 days, and before the expiration of the time for appeal, but only with leave

of court obtained on notice and hearing and on a showing of due diligence, Rule 59(b).

It would seem clear that, under the general rule established by the decisions heretofore referred to, the making within the time provided by said Rules of Civil Procedure of such of those motions as may be made as a matter of right, automatically suspends the running of the time for appeal from the judgment until such motions are disposed of. (See 3 Moore's Federal Practice, Sec. 50.02, p. 3111; Sec. 52.03, p. 3120; Sec. 59.03, p. 3251; *Neely* v. *Merchants Trust Co.* 110 F(2d) 525 (CCA 3d); *Suggs* v. *Mutual Ben. Health and Accident Ass'n,* 115 F(2d) 80, 82 (CCA 10th).

Rule 6(b) authorizes the District Court to enlarge the time for making such motions except the time provided by Rule 59 for a motion for new trial. Rule 6(b) expressly provides that the court may not enlarge "the period for taking an appeal as provided by law." Rule 6(c) provides that the period of time for doing any act or taking any proceeding is not, nor is the power of the court to do any act or take any proceeding in a civil action which has been pending before it, affected by the expiration of a term of court. Hence a motion (other than a motion for new trial) made within such enlarged time, and prior to the expiration of the time for appeal from the judgment, would likewise automatically suspend the running of the time for appeal until such motion was disposed of.

Nevertheless, difficulties have arisen in determining the effect of motions made after judgment upon the running of the time for appeal, as illustrated by the case of *Leishman* v. *Associated Wholesale Electric Co.,* 128 F(2d) 204 (CCA 9th) which was reversed by the Supreme Court, 318 U. S. 203, 87 L.ed. 495, 63 S. Ct. 544, (Feb. 15, 1943). In that case an action was brought for patent infringement. The District Court made findings of fact and stated its conclusions of law, and on May 1, 1941, its judgment was entered dismissing the complaint.

On May 28, 1941, plaintiff, after securing an enlargement of time for so doing under Rule 6(b), filed a motion under Rule 52(b) asking that the findings "be amended and supplemented" in certain respects set out in the motion and concluded its motion with the statement that "Consistently with these findings, the conclusions of law should be amended to state that the claims * * * in suit are valid; that an injunction shall issue in the usual form, and that there be an accounting for past infringement."

This motion was denied by the District Court on June 9, 1941. Notice of appeal was filed on September 4, 1941, which was more than three months after the entry of the judgment.

The Court of Appeals, itself raising the question, held it had no jurisdiction of the appeal because the notice of appeal was not filed within the three months period for appeal from the judgment allowed by the statute, 28 USCA, Sec. 230. It appears from the opinion of the Court of Appeals (128 F(2d) p. 205) that appellant invoked the rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and is entertained, the time for appeal, does not begin to run until the motion is disposed of. The Court of Appeals held that rule did not avail appellant because the motion "was merely a motion to amend and supplement the findings and conclusions," and dismissed the appeal.

The Supreme Court, in reversing the Court of Appeals, observed (318 U. S., P. 205) that the Court of Appeals "recognized the general rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion" but that it had differentiated this case on the ground the motion was not one to amend the judgment but merely to amend and supplement the findings and conclusions.

The Supreme Court in holding the appeal was timely said that the motion was not addressed to mere matters of form but raised questions of substance since it sought reconsideration of certain basic findings of fact and the alteration of the conclusions of the court; that the necessary effect was to ask that rights already adjudicated be altered, and consequently it deprived the judgment of that finality which is essential to appealability; and that it was immaterial that petitioner (the plaintiff) did not specifically request the amendment of the judgment. In conclusion the Supreme Court said (318 U. S., P. 206);

"We conclude that a motion under Rule 52(b) such as the instant one which seeks

to amend or supplement the findings of fact in more than purely formal or mechanical aspects tolls the appeals statute, and that the time for taking an appeal runs from the date of the order disposing of the motion. Cf. Continental Oil Co. v. United States, 299 U. S. 510.

"The motion was not one for a new trial under Rule 59 and respondent's argument, based on that premise, that it was not filed in time, is not pertinent."

In the light of the decision of the Supreme Court in this case, there can be little doubt as to the necessary character of a motion under Rule 52(b) to suspend the running of the time for appeal.

And from the concluding paragraph of the Supreme Court's opinion, I think it can be said that the Supreme Court views a motion made under Rule 52(b), within an enlarged time therefor obtained under Rule 6(b), as a motion made as of right which automatically suspends the running of the time for appeal from the judgment until the motion is disposed of whether the motion is "entertained" by the District Court or not. Thus if the District Court in that case after the motion had been filed had vacated its order enlarging the time for making it and had stricken the motion, I believe the Supreme Court would nevertheless have held that the time for appeal did not begin to run until the motion was thus disposed of. It is unfortunate, however, that the Court in view of its reference to the general rule as to the effect of a petition for rehearing, motion for new trial, or motion to vacate, amend or modify a judgment, did not take occasion to say that the requirement that such a petition or motion be "entertained" did not apply to a petition or motion filed as of right, and thus dispel any possible doubt on the subject.

A situation arose in *Fiske* v. *Wallace*, 115 F(2) 1003 (CCA 8th) which indicates the desirability of some amendment in respect to the time of entry of judgment. In that case findings of fact and conclusions of laws were made by the District Court, and final judgment was entered March 30, 1940. On April 9, 1940, the defendants, Fiske, et al., filed their notice of appeal. Afterward, but on the same day, the plaintiff, Wallace, filed a motion pursuant to Rule 52(b) asking that the conclusions of law and the judgment be amended and that the amount of the judgment be increased. This motion it will be noted was filed within the 10-day period specified therefor by Rule 52(b). The motion was overruled on July 25, 1940, and on July 29, 1940, Wallace filed notice of appeal from the judgment of March 30, 1940.

The Court of Appeals held that the mere existence of plaintiff's right to file a motion under Rule 52(b), or for a new trial under 59(b), did not deprive defendants of their right to appeal prior to the filing of such a motion, and notice of appeal having been filed by defendants before plaintiff's motion under 52(b) was filed the trial court lost jurisdiction, and therefore plaintiff's motion did not extend the time for plaintiff to appeal and since plaintiff's appeal was taken more than 3 months after the judgment it was too late.

Plaintiff's motion to dismiss the defendants' appeal was denied, and the defendants' motion to dismiss plaintiff's appeal was sustained.

As to what the plaintiff could do in such a situation the court said, P. 1005:

"After the judgment defendants had appealed, he had the right to take a cross appeal or to file his motion (within time) in the trial court and within time limited by statute for appeal from the judgment apply to this court to remand the case for consideration of his motion to modify."

An amendment as to the time of entry of judgment would not affect a motion to amend a judgment, which of course can only be made after the judgment. However, in respect to such motions as can be made before judgment, an amendment could be made as the time of entry of judgment which would enable such motions to be made and disposed of before judgment was entered.

While it is my opinion that the possibility of amending the Rules to escape the burden of a study of case-law to determine when motions have the effect of suspending the time for appeal should be considered, any drastic amendment which might necessitate so many changes in the Rules as to upset their general plan and possibly present problems more difficult to determine than exist under the Rules as they now stand should be avoided. An amendment to the effect that judgment should not be entered until after the expiration of the 10-day period for the making of a motion after verdict under Rule 50(b) and for amended findings, which should expressly include conclusions of law as well, under 52(b) and for a new trial under 59(b), and not until after the disposition of such

motions if made within such period, could readily be made, and would probably accomplish, it seems to me, about all that is desired along that line.

SHOULD RULE 59(a) BE AMENDED TO SPECIFY THE GROUNDS FOR NEW TRIAL?

Rule 59(a) provides that a new trial may be granted, on all or any part of the issues, (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

As stated in the Notes to the Rules prepared under the direction of the Advisory Committee on Rules for Civil Procedure, Rule 59 represents an amalgamation of the petition for rehearing of Equity Rule 69 and the motion for new trial of U. S. C. Title 28, Sec. 391.

28 U. S. C. 391 provided:

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law. * * *"

New trials were granted for various reasons, for example—because of errors in rulings on evidence; erroneous instructions; because the verdict was contrary to the law or the evidence or not supported by sufficient evidence; because of inadequate or excessive damages; misconduct of counsel in argument or misconduct of the jury; or because of newly-discovered evidence (3 Moore's Federal Practice pp 3243-3246; 18 Hughes Federal Practice, Sec. 25532).

Equity Rule 69 did not specify the grounds for a petition for rehearing. However, the rehearing in equity was said to be for the same reasons that a new trial would be granted at common law (3 Moore's Federal Practice, P. 3247). The authors of that book there say:

> "It is obvious that many of the reasons for a new trial where there has been a jury trial would not apply in a non-jury case. But, wherever appropriate, a rehearing in equity and, under the Rules, a new trial in non-jury actions should lie where a new trial at law, or in a jury action under the Rule, could be obtained.
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> "In equity, however, two grounds for a rehearing were most commonly known: (1) for error of law or fact on the face of the record; and (2) for newly discovered evidence. Thus in general, rehearing served in term as a bill of review served after term."
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> (As to what were grounds for rehearing in equity, see also 18 Hughes Federal Practice, Sec. 25533).

It has been suggested that the grounds for a new trial should be specifically set forth in the Rules to avoid the necessity of research to determine the reasons for which new trials were granted in actions at law and rehearings were granted in suits in equity.

If this could be readily done, it would seem desirable. Unless, however, all of the grounds were set forth and it was stated what grounds were applicable to jury and non-jury trials such an amendment would probably not be particularly helpful, and to attempt to do this by rule, it seems to me, would be very difficult to accomplish without unduly lengthening and encumbering the Rules.

I am inclined to believe that instead of attempting such an amendment, it would be better if illustrative forms of a motion for a new trial in a jury and in a non-jury case could be added to the Appendix of Forms.

* * *

CHAIRMAN BENOY: Mr. Hocker says that his father helped brief this case of Fiske v. Wallace. He may be able to add something to it. But, in Ohio, the statute provides that all motions shall be disposed of before judgment is entered. We require a motion for new trial to be filed within three days after the verdict is returned or the report of the decision. In fact, Ohio has these rules and has had them for years, in great part. When all motions are disposed of and judgment is entered, your time for appeal begins to run, and it is that possibility of conflict and loss of the right of appeal that we feel should have attention in drafting amendments to this rule. It seems to me they have got the cart before the horse.

Mr. Hemry now is going to tell us about what the present status of the law is in reference to requiring you to turn over your files, including your investigation and names of witnesses, etc., to the other side. Mr. Hemry.

Discovery and Production of Confidential Files Under Rule 34—By Leslie P. Hemry

Before proceeding to the consideration of any particular rule, or any amendments thereto, it might be pertinent to observe that the Federal Rules of Civil Procedure (28 U. S. C. A. following section 723c) were designed to subordinate form to substance, to secure a more fair and speedy administration of justice and to facilitate the disposition of justiciable disputes on their merits than on technical grounds of procedure. Any suggested changes in the rules which will make them better vehicles for securing these objectives should be given serious consideration. Any suggested changes which, while better protecting the interests of a particular class of litigants, do not serve these ends are not worthy of consideration and are not likely to be adopted.

For our purposes Rule 34 may be condensed to the following: "Upon motion of any party showing good cause therefor . . . the court . . . may (1) order any party to produce and permit the inspection and copying or photographing by or on behalf of the moving party, of any designated documents, papers . . . letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control." The rule in subdivision two permits entry upon land but we are not here concerned with that part of the rule. Hereafter the word "documents," in quotes, will be used as including all or more than one of the items covered by this rule.

There are four points in the rule, as condensed above, which are particularly important to our consideration here:

1. *The rule requires a showing of "good cause."* This is not defined in the rule and obviously gives the court considerable discretion in granting or denying the motion. While this provision may be the basis implicit in many of the opinions, it has been explicit in only a very few. In two cases the court flatly stated that "good cause" was not shown and therefore the motions for discovery were denied *Seals v. Capital Transit Co.*, D. C., D. of C., Jan. 1940, 2 Fed. Rule Service 377, *Thomas French and Son v. Carlton Venetian Blind Co.*, D. C., N. Y., 1939, 30F. Supp. 903. In another case the court observed, "The plaintiff before he is granted sweeping discovery, must somehow convince the court that there is, at least, reasonable grounds to believe that a cause of action exists, and can be proved if the necessary facilities are afforded him, *Simonin v. American Can Co.*, 30F. Supp. 901.

2. The rule applies only to *"designated documents."* This requirement, it would seem is designed to prohibit "fishing expeditions" *Schweinert v. Ins. Co. of N. America*, D. C., N. Y., Nov. 1940, 1 F.R.D. 247, *Thomas French and Son v. Carleton Venetian Blind Co.*, 30 F. Supp. 903, D. C., N. Y., 1939, *Sonken-Galamba v. A. T. and S. F. Ry.*, 30 F. Supp. 936, D. C., May, 1939. On the other hand one court says, "The rules permit 'fishing' for evidence, as they should. If documents in defendant's possession tend to sustain plaintiff's claim, plaintiff is entitled to inspect them and have use of them as evidence." *Golden v. Arcadia Mutual Casualty Co.*, D. C., Ill., Nov. 1942, 6 Fed. Rules Service 449. It should be noted, however, that the issue in this case was jurisdiction of the Missouri courts and not liability of an insured. The cases also point out that if the moving party cannot sufficiently "designate" the "documents" that he, "should by a discovery examination of parties determine what material documents exists and where they are." *Monarch Liquor Corp. v. Schenley Dist. Corp.*, D. C., N. Y., July 1941, 2 F.R.D. 51. To same effect: *U. S. v. Schine Chain Theatres, Inc.*, D. C., N. Y., Feb. 1942, 5 Fed. Rules Service 474; *Rosenblum v. Dingfelder*, D. C., N. Y., Oct. 1941, 2 F.R.D. 309; *Clark v. Chase National Bank*, D. C., N. Y., July 1941, 2 F.R.D. 94.

3. *The rule applies only to documents "not privileged."* This requirement has been interpreted rather strictly and, for purposes of this paper, may be said to be confined to statements or letters between an attorney and his client. *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, D. C., N. Y., April 1941, 4 Fed. Rules Service 551; *E. W. Bliss Co. v. Cold Metal Process Co.*, D. C., Ohio, Feb. 1940, 3 Fed. Rules Service 374. It has been specifically held that it doesn't apply to statements given by a party or his attorney to opposing parties or their counsel, (the *Bliss* case above) or to statements merely because they are later turned over to an attorney. *Bough v. Lee*, D. C., N. Y., June 1939, 29 F. Supp. 498; *Colpak v. Hetterick*, D. C., N. Y., August 1941, 40 F. Supp. 350.

4. The "documents" must *"constitute or contain evidence material to any matter in-*

volved in the action." This provision has created considerable controversy and difference of opinion. The question arises as to whether it means admissible evidence or whether mere relevancy is sufficient and how sure the court must be of the contents of the "document" before granting the motion. The better view seems to be that if there is a "reasonable probability" of discovering admissible evidence that the motion will be allowed, and that the question of admissibility of the "documents" themselves can be determined at the actual trial. *Beler v. Savarona Ship Corp.*, D. C., N. Y., Feb. 1939, 26 F. Supp. 599; *Bruun v. Hanson,* D. C., Idaho, Dec. 1939, 30 F. Supp. 602; *Quemos Theatre Co. v. Warner Bros. Pictures, Inc.,* D. C., N. J., Dec. 1940, 35 F. Supp. 949; *Compagnie Continentale v. Pac. Argentine Brazil Line,* D. C., N. Y., June 1940, 3 Fed. Rules Service 372. The court also has ample authority to require submission of the "documents" to it for examination and determination of relevancy before permitting scrutiny by the moving party. *U. S. v. Aluminum Co. of America,* D. C., N. Y., Jan. 1939, 26 F. Supp. 711. This provision also involves a determination of the proper relationship between Rule 34 and Rule 26. This rule, which deals with depositions, provides that, "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." It will be noted that Rule 26 uses the word "relevant" rather than the words "evidence material to." It should also be noted that one of the early drafts of the Federal Rules used only the word "relevant" in Rule 34 but this was changed before final adoption. It would seem, therefore, that Rule 34 should be more strictly construed than Rule 26. A contrary view is taken in at least one law review note. *Scope of Pre-Trial Discovery under New Federal Rules* (1941), 50 Yale Law Journal 708. This article urges an extremely liberal interpretation of Rule 34. This problem is also discussed in a comment entitled *"Discovery of documents not Admissible in Evidence"* 4 Fed. Rule Service 919.

Insurance companies and their counsel are vitally concerned with this rule, its interpretations, and possible amendments, because it might be made the vehicle for turning all or a part of their investigation and trial files over to the plaintiff and his attorney. Before reviewing the decided cases it might be well to at least list some of the principal contents of such files. Such a list would include:

1. Notice of accident to insurance company.
2. Written statements of plaintiff and defendant.
3. Written statements of witnesses.
4. Written reports of the investigator which would include the names and addresses of all witnesses, and might include oral statements of plaintiff or defendant or other witnesses.
5. Correspondence concerning claim.
6. Photographs of scene of accident or other places or objects.
7. Doctors reports.

Now let us see how much of this list the courts have opened up to the gaze of our opponents.

Probably the leading case permitting examination of insurance company files is *Bough v. Lee* 26 F. Supp. 1000, 28 F. Supp. 673, 29 F. Supp. 498, February-June 1939. This case inspired at least three published opinions by the Federal Court for the Southern District of New York, one ruling by the District Court in Pennsylvania and one decision by the Circuit Court of Appeals, second circuit. The final result of all the maneuvering was that the plaintiff, in a personal injuries action was permitted to examine: 1. Defendant's signed statement taken by an insurance company adjuster; 2. Photographs of defendant's automobile taken by the adjuster and shown to plaintiff when she was in the hospital, and 3. Statement of plaintiff taken by the adjuster. The court in permitting discovery said that the defense attorney "is not requested to open up his files to plaintiff," that the "documents" requested were not privileged; and that they might be relevant and material on cross-examination or redirect examination. There are two other points in this case worth noting here: first, that the case was handled all the way through under Rule 26 rather than Rule 34, and secondly, that since notice for taking the deposition of the plaintiff had been given before the motion involved here was perfected, that the order to produce was held up until after completion of plaintiff's deposition.

Another oft-cited case is *Price v. Levitt,* 29 F. Supp. 164, Aug. 1939, D. C., N. Y. This was an automobile case where, in addition to a doctor's report, statements had been taken from the plaintiff and plaintiff's daughter and son-in-law who were with plaintiff at

the time of the accident. Here again the plaintiff moved under Rule 26 to take the deposition of the insurance company through its investigator and secure these documents. In permitting this procedure, the court said that the insurance company, "file, showing as it must, much hearsay, should not be opened to the plaintiff" but that the documents described above were "relevant, and may properly be used in cross-examination at least, of such witnesses, if called, and plaintiff is entitled to a copy of them."

Two other cases of a similar nature are *Colpak v. Hetterick,* D. C., N. Y., August 1941, 40 F. Supp. 350 and *Leach v. Grief Bros. Cooperage Corp.,* D. C., Miss., July 1942, 2 F.R.D. 444. The *Colpak* case allowed a plaintiff to secure by deposition written statements of defendant, defendant's wife, doctor's reports and any oral statements of the foregoing given to the insurance company representative. The court refused to compel insurance company representative "to give hearsay evidence or exhibit the files" but said the "documents" mentioned might "contain admissions against interest." The *Leach* case allowed discovery of statements of plaintiff and other witnesses. These statements were procured by a representative of plaintiff at the request of the attorney for the defendant. The court said the rules should be liberally construed in order to avoid surprise, delay and lengthy cross-examination.

Another interesting case which allowed examination under Rule 26 of insurance company representative about investigation of claim and statements taken, is *Kulich v. Murray,* D. C., N. Y., June 1939, 28 F. Supp. 675. This case went off on the grounds that since an important issue in the case was whether or not the individual defendant was using his car in the business of the corporate defendant at the time of the accident, that examination would be permitted.

Other cases have sanctioned discovery of original reports of the Captain and other officers of a boat involved in an accident, *Revheim v. Merritt, Chapman and Scott Corp.,* D. C., N. Y., Jan. 1942, 2 F.R.D. 361; ship's log and photographs of scene of accident, *Kenealy v. Texas Co.,* U. S., D. C., N. Y., Oct. 1939, 29 F. Supp. 502 *Murphy v. N. Y. and Porto Rico Steamship Co.,* D. C., N. Y., April 1939, 1 Fed. Rules Service 450; doctor's reports and hospital records, *Galanos v. U. S.,* D. C., Mass., April 1939, 27 F. Supp. 298, *U. S. v. Smith,* U. S. C. C. A. 9th, Feb. 1941, 117 F. (2) 911; railroad's reports concerning repairs made to a steam crane after an accident, *Mackerer v. N. Y. Cent. R. Co.,* D. C., N. Y., Oct. 1940, 3 Fed. Rules Service 388; and names and addresses of witnesses, *Maryland v. Pan-American Bus Lines,* D. C., N. Y., April 1940, 1 F.R.D. 213, *Stern v. Exposition Greyhound, Inc.,* D. C., N. Y., April 1941, 1 F.R.D. 696.

Turning now to the other side of the ledger we find many cases which have either completely or substantially barred access to defendant's files. The two leading cases are: *Kenealy v. Texas Co.,* D. C., N. Y., Oct. 1939, 29 F. Supp. 502 and *McCarthy v. Palmer,* D. C., N. Y., Oct. 1939, 29 F. Supp. 585.

The *Kenealy* case was an action for personal injuries to a seaman under the Jones Act and plaintiff wanted to inspect and copy from defendant's files: 1. Statements of witnesses to accident, 2. The logs of the vessel, and 3. Photographs of the scene of the accident. The court allowed discovery of the photographs and vessel logs but in refusing the statements of witnesses said, "statements now in question are without the letter as well as the spirit of Rule 34." The court leans heavily on the authority of an opinion of Cardoza when Chief Judge of the New York Court of Appeals, *Peoples ex rel Lemon v. Supreme Court,* (1927) 245 N. Y. 24, 156 N. E. 84. The *Kenealy* case is cited and followed in: *Fluxgold v. U. S. Lines,* D. C., N. Y., Oct. 1939, 29 F. Supp. 506 involving statements of officers and crew of a ship, and *Bennett v. Waterman S.S. Corp.,* D. C., N. Y., Oct. 1939, 29 F. Supp. 506 involving statements given to an insurance company representative. Another case, which relies on the *Kenealy* case, is *Rose Silk Mills, Inc. v. Insurance Co. of North America,* D. C., N. Y., Oct. 1939, 29 F. Supp. 504. This involved a motion under Rule 26 to examine the insurance company representative concerning the investigation of the claim and the reports and letters in the file. The motion was denied on the grounds that the material sought was pure hearsay and not relevant to the issues involved.

The other leading case mentioned above, *McCarthy v. Palmer,* grew out of an action against an employer for personal injuries sustained by an employee and involved the question of how far the rules permit one party to use the results of the independent investigation of the other party in preparing

for trial. The court said, "While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponents preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended." At least three cases have specifically cited the *McCarthy* case as authority when denying motions for discovery of statements taken from witnesses by the opposing party. *Stern v. Exposition Greyhound, Inc.*, 1 F.R.D. 696, *Piorkowski v. Socony Vacuum Oil Co.*, D. C., Penna., Oct. 1940, 1 F.R.D. 407, and *Courteau v. Interlake Steamship Co.*, D. C., Mich., Jan. 1941, 4 Fed. Rule Service 546. Two other cases reach the same result. One court in denying discovery said the "documents" would not be admissible evidence, "except possibly as a means of contradicting one who in the trial may testify contrary to a previous written statement" *Slydell v. Capital Trans. Co.*, D. C., D. of C., Oct. 1939, 1 F.R.D. 15; and another decision denied discovery on the grounds that plaintiff had not shown "good cause" as required by the rule. *Seals v. Capital Co.*, D. C., D. of C., Jan. 1940, 2 Fed. Rules Service 377. *Barwick v. Powell*, U. S. Dist. Court, N. Y., Jan. 1941, 1 F.R.D. 604 uses the same reasoning as the *Slydell* case.

The case in which the plaintiff asks in greatest detail for the insurance company file is *Poppino v. Jones Store Co.*, D. C., Mo., March 1940, 1 F.R.D. 215. Here plaintiff seeks: 1. Defendant's report of accident to the insurance company; 2. Plaintiff's statement; 3. Photographs of scene of accident; 4. Report made by insurance company doctor; 5. Report made by plaintiff's doctor, and 6. Written memorandum made by insurance company investigator listing the items of damages claimed by plaintiff. In denying the entire motion the court ruled that even though the documents might contain admissions or might be used to attack credibility of a witness that discovery should not be permitted.

Another important case is *Schweinert v. Insurance Co. of North America*, D. C., N. Y., March 1940, 1 F.R.D. 247. This case specifically rules on a question which is involved in other cases but not mentioned in the opinions. Here after plaintiff had moved under Rule 26 to take deposition of insurance company investigator, the insurance company moved under Rule 30 to limit the scope of the examination so as to avoid producing certain documents. After stating that the plaintiff was trying to avail herself of the "fruits of an investigation undertaken by the defendant at its expense" the court ruled that, "The plaintiff will be left to her remedies under Rule 34 for the production of documents." A similar ruling is found in another case which did not involve an insurance company. *Heiner v. North American Coal Corp.*, D. C., Pa. Dec. 1942, 7 Fed. Rules Service 266.21 Case Number 1.

In interpreting Rule 32 of the admiralty rules, which is identical to Rule 34, one court has made the argument that the denial of discovery of written statements of witnesses will not cause surprise so long as the witness tells the truth both times. The court argues that this denial is a good thing because it keeps a witness from coloring his story in favor of his own interests as his memory dims. A similar argument was made by Walter O. Schell Esq., of the Los Angeles bar in his paper before the Insurance Section of the American Bar Association at the Detroit meeting in 1942. Insurance Section proceedings p. 278.

The decided cases make it abundantly clear that some courts will allow a plaintiff to invade an insurance company file at least to the extent of securing copies of written statements of parties and some witnesses, photographs, names and addresses of witnesses, and doctor's reports. None of the cases seem to go any further than this, and most do not go as far. The question therefore arises as to whether or not the foregoing "invasions" are more consistent with the objectives of the Rules than a denial of such privileges would be. My feeling is that the Rule should permit "discovery" only of the names and addresses of witnesses and all of the other "discoveries" listed above should be prohibited. My primary reason for denying access to statements of all kinds is that it encourages and rewards honest testimony and discourages and penalizes perjured and colored testimony. An honest story will be substantially the same regardless of how many times it is repeated, and to "surprise" a dishonest party or witnesses seems to me a desirable thing. We cannot shut our eyes to the fact that some testimony is perjured and much is colored. The arguments that too free a dis-

covery penalizes the diligent and rewards the lazy, and that it permits one party to use without charge material gathered by another at some expense, are not nearly so persuasive to me. We have lazy and poor litigants (and lawyers) who have good causes, and the job of the courts is to deal justly with causes, not pass judgment on comparative industry or financial investment. It is for this reason that I have excepted from my suggested prohibition the "discovery" of names and addresses of witnesses. Such discovery should aid in the presentation of the case and would not be subject to the criticisms made above of a more liberal rule.

An amendment to the Rule would seem to be the only practical way to solve the present problem and resolve the differences between the rulings of the various courts. These rulings cannot be rectified by appealing a case to the U. S. Supreme Court because, "An order of this nature is interlocutory and, therefore, not appealable." *Leader v. Apex Hosiery Co.*, U. S. C. C. A. 3rd Cir., 1939, 102 F. (2) 702.

The amendment suggested by the association committee on Practice and Procedure is probably an adequate amendment to Rule 34. This amendment is as follows:

Words in brackets are deleted; words in italics are added.

"RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, (which constitute or contain evidence material to any matter involved in the action) *provided the same would be legally admissible in evidence in the action for any purpose other than solely as an admission or as an impeachment of the witness;* or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

The term 'privileged,' as used in this rule, shall be deemed to include the results of any investigation made by any party to an action or anyone on his behalf, for the purpose of ascertaining any facts material to said action or for the purpose of preparation for trial thereof.

In view of the numerous decisions which have permitted discovery of documents in connection with the taking of a deposition under Rule 26 I am inclined to think that an amendment to Rule 26 might also be advisable. Perhaps it would be sufficient to merely provide that the Rule cannot be used for the purpose of securing "documents" for examination or copying. It is probably not necessary to amend either Rule 26 or 34 to safeguard the right to "discover" the names and addresses of witnesses since Rule 26 is already so explicit on this point.

Before concluding I think one more case should be mentioned. This is *Hoffman v. Palmer*, U. S. C. C. A. 2nd Cir., 1942, 129 F. (2) 976. This case arose out of a railroad crossing accident. One of the main issues involved on the appeal was a ruling by the trial court that if the defendant's counsel called for and examined a written statement given by one of the plaintiff's witness to the plaintiff's attorney that it would then become admissible should plaintiff's attorney choose to offer it. The fact that the statement had been given came out on cross-examination at the trial and when the court ruled as described above, defendant's counsel withdrew his request to examine the statement and assigned error. Judge Jerome Frank speaking for a circuit court which was unanimous on this point describes two general theories which he deems in conflict. The first theory might be characterized as the "sporting theory" of justice; while the second could be described as a movement to get at the facts by a very liberal discovery. Judge Frank spends considerable time philosophizing about resistance to change and states that the second theory is now in the saddle but that it is too early to know which theory is right because "the returns are not yet in." He indicates that the new Rules would permit "counsel for the adversary" to scrutinize the data of the "law-

yer who has diligently prepared his case." He then goes on and decides that the trial judge was wrong in his ruling but refuses to reverse because the statement in question is not in the record and he can't be sure that it would have affected the verdict in the case. This decision of Frank's was affirmed by the Supreme Court in February of this year, 318 U. S. 109. The decision itself is obviously not important as a ruling on the subject under discussion, but the extremely liberal approach evidenced by Frank's opinion may well be significant.

* * *

THE CHAIRMAN—Mr. Hermy shows that he has put in a great deal of research on this matter and brought our precious speeches, etc., down to date. I think we will go ahead now with the next Rule we have for discussion, and if you will save your gunfire for Mr. Hermy until after we get through with them, we shall appreciate it.

Mr. Hocker will now give us Rule 14 and Rule 30.

* * *

Third Party Practice, Rule 14: Depositions, Rule 30—By Lon Hocker, Jr.

In order to bring my article of July, 1942, up to date, the following cases should be added to the list of cases contained on Page 33:

U. S. vs. Pryor, 2 F.R.D. 382; U. S. F. & G. Co. vs. Janich, 3 F.R.D. 16; Williams vs. Keyes, 125 F. (2d) 208 (C.C.A. 5) (Jan. 1942); Golconda Petroleum Corp. vs. Petrol Corp., 46 F. Supp. 23.

The article still expresses my views with respect to the validity of the interpretation of the rules to authorize acquisition of jurisdiction over third-party actions which are, as the decisions say, "ancillary" to the principal action. I am not wholly in accord with so much of the Committee report as attempts to cure this construction by adding, as an amendment to the rule, the clause "who is subject to the jurisdiction of the court." In the first place, I feel that if the Supreme Court agrees with the thought expressed in my article—that the assumption of these ancillary controversies violates the Constitution, the judiciary act and the rules themselves, it would be much simpler and a great deal neater for the Supreme Court to so announce when the first decision involving this point comes before them rather than by amending the rules themselves. The amendment seeks to correct not the rule, but a misinterpretation of the rule, and if I am right in my conclusion that the courts are wrong in their interpretation of Rule 14, then the rule as it stands does not enlarge the jurisdiction of the courts and needs no amendment.

In the second place, I am inclined to think, even assuming the necessity of an amendment, that the proposed amendment would have no effect upon the interpretation given this rule by the courts. There is no contest on the question of whether the court can issue a third party summons against a third party defendant who is not subject to the jurisdiction of the court. The question arises on the issue of whether a third party action can be commenced where the court has jurisdiction of the third party defendant, but has no independent jurisdiction over the subject matter of the third party action. Of course, the courts hold that they have such jurisdiction by reason of the controversy's being ancillary to the primary action. Accordingly, if an amendment is to be effective, I think it must be in about the following terms:

The first sentence of Subdivision a, Rule 14, might be amended by striking the period and adding thereafter the clause "where the third party action would be independently cognizable in the District Court." This amendment would make unnecessary the repetition of the phrase "subject to the jurisdiction of the court."

Rule 14—Repleading: With respect to the proposed amendment requiring a repleading by a third party in an appropriate case, I very much doubt the wisdom of requiring a plaintiff to proceed against a vouched-in third party. In the first place, adequate relief can always be obtained in such a situation by two judgments: One in favor of the plaintiff and against the defendant, and the second in favor of the defendant and against the third party defendant. To require a plaintiff, against his will to proceed against a third party direct would be highly desirable, of course, so far as the original defendant is concerned, but not so desirable so far as the plaintiff is concerned. Indeed, without having studied the subject carefully, I have grave doubt as to its constitutionality. The plaintiff should be entitled to sue whomever he has a cause of action against. An easy example occurs where the original defendant is perfectly solvent and the third party defendant on the verge of insolvency.

I think that I can improve upon the word-

ing of this amendment, too, assuming its desirability. Instead of adding a new sentence, change the word "may" to "must" in the second preceding sentence, so that it reads "the plaintiff must amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant."

Rule 30 (e)—With respect to Rule 30, I think this rule should be amended at least in one respect. Section (e) should be amended by omitting the phrase "by the witness and.' Notwithstanding this rule, the practice has not been changed under which from time immemorial the lawyers have waived the signature of the witness among themselves without consulting the witness. There seems to be no good reason for requiring the witness to waive the signature. Since the adoption of these rules I have always either required signature or waiver by the witness himself, but unless the witness happens to be a lawyer or represented at the taking of the depositions by a lawyer, it is often very difficult to secure a waiver from him and nearly impossible to secure a written waiver, since the witness doesn't know what the waiver involves. There is no substantial reason why the witness should waive his signature. The parties can agree among themselves that a witness would testify to whatever effect they agree upon and read it in evidence as a stipulation binding both parties, but no stretch of the imagination binding the witness. He can neither be prosecuted upon it nor impeached should he subsequently in another action testify differently. This is similarly true of an unsigned deposition. Should such a deposition be offered to impeach the witness in another action, it would, of course, be subject to the objection that it is not the best evidence, as the stenographer's notes were, and either it or the stenographer's notes would be subject to oral contradiction by the witness in the event there was discrepancy between the recollection of the witness and the reporter's notes and transcript. This is because in any other action, the impeachment arises not from the stipulated statement, but from someone's testimony as to what the witness said—fortified in the latter case by the stenographer's notes. Furthermore, the notes or unsigned transcript (subject to the best evidence rule) could be used to impeach his later contradictory statement whether or not he had waived his signature and precisely to the same extent and effect. For these reasons, the inclusion of this phrase seems to have been an inadvertence on the part of the drafters of the rules due to a zealousness to protect the interests of the witness not justified either in reason or in previous practice. So far as I know, there is no authority involving this point or any publication with respect to it.

Rule 30 (b)—Possibly an amendment is desirable to Section (b) of Rule 30 to authorize the District Court where the action is pending (and by reference similarly the court in whose district the depositions will be taken —see Subsection d) to appoint a commissioner to preside at the taking of the depositions. Broad discovery powers have been granted by the rules, and there is a great deal of feeling, as evidenced by the reports of the other members of our Committee, that in some respects, and as interpreted by the courts, these powers are entirely too broad. Certainly, the rule-makers recognized that the unlimited power to take depositions is subject to gross abuse. That is the very purpose of Subsections b and d. The cases hold that in the absence of a clear showing of bad faith the court will not, in advance, prohibit the taking of depositions or effectually limit the scope of them. Krier vs. Muschel, 29 Fed. Supp. 482; Application of Zenith Radio Corp., 1 F.R.D. 627; Stankiewicz vs. Pillsbury Flour Mills Co., 26 Fed. Supp. 1003. The procedure required seems to be that the depositions must proceed until in the opinion of the party notified the bad faith has been demonstrated, at which time the transcription of the proceedings must be made and presented to the District Court for consideration. Zuckerman vs. Pilot, 1 F.R.D. 130. Such a procedure requires either that the party notified be actually subjected to the annoyance, embarrassment or oppression from which Rule 30 b and d were supposed to protect him before he can be relieved, or that he stand in contempt during such time as the transcript is being prepared while he refuses to answer questions, or that he follow the rather strange procedure of the Stankiewicz case of obtaining leave in advance to terminate the depositions while the record is being written up, in the event that an application is deemed necessary under Rule 30 d. All of this seems strangely and unnecessarily awkward. These problems could be quickly and easily solved by the appointment of a commissioner or master to preside representing the court at the taking of the depositions. A

detailed method of accomplishing this result is set forth in Section 1923 of the Missouri Revised Statutes for 1939. I think the details of such a plan could well be left to the District Court's order. Because of the broad language of Rule 30 b, it might be argued that this power exists in the District Court. So far as my research discloses, there has been only one application for a master, and that is what I thought was in a very aggravated case. It is reported as Michels vs. Ripley, 1 F.R.D. 332, Southern District of New York, February 8, 1939. The notary before whom the depositions were to be taken according to the notice, either was at the time or subsequently became associated with the attorney for the notifying party, and therefore was not disinterested in the outcome of the case. The depositions projected were anticipated as taking 8 or 9 days, and the party notified applied to have the court appoint a special master to preside at the taking of the depositions in lieu of the notary. This the court denied, saying that the notified party would be obliged to protect himself by proceeding under Subsection d if the going got too rough in the taking of the depositions. I can see no objection to the appointment of a commissioner or a master under these circumstances. Several lawyers from States where this practice is not followed have made suggestions to me with respect to the cost of such relief. There is no reason why they should not be handled as are the costs of the notary. The party requesting the master, like the party employing the stenographer, generally advances or guarantees his stipend and taxes it as costs to be paid by the party losing the lawsuit. I think a liberal interpretation of the rule would authorize the court to appoint a master under such circumstances, but apparently this has not been the interpretation given the rule in the one case in which this matter has arisen, and I believe it is important enough to justify a change. As to the wording of the amendment itself, I suggest that the last clause be amended by inserting after the phrase "or the court may" the clause "appoint a special master to preside at the taking of the depositions and to pass preliminarily upon the admissibility of any evidence sought to be elicited, or may."

CHAIRMAN BENOY: I thank Mr. Hocker for the consideration that he has given his phase of this work. I think he has something when he suggests the first amendment. However, the suggestions for the amendments that are contained in the report were based upon the assumption that the theory of the rule had been decided when the rule was enacted, and the theory of it evidently is to solve all litigation in the same case, so that it was therefore the intent, undoubtedly, of the rule originally to require a repleading as against the person secondarily liable who was brought in under the third party practice, but the rule has complicated itself so much in the question of obtaining jurisdiction and venue that it seems to fail of the purpose that was intended. Certainly the makers of these rules had no intention to amend the Constitution of the United States or the federal law, which specifies and imposes jurisdiction upon the district courts, and that seems to have been lost sight of altogether by these judges who have decided these miscellaneous cases.

I would like to give the remaining gentlemen on the program a chance before we get into this prolonged discussion. The good-looking gentleman behind this high-backed chair here has something to say on the Possibilities of Making an Insurance Carrier a Third Party Defendant Under Rule 14, and if he will come around and sit on the other end of the table where we can see him, we will let him get started. Mr. Hobson.

* * *

Possibilities of Making Insurance Carrier a Third Party Defendant Under Rule 14

By Robert P. Hobson

Gentlemen, those of you who have these few printed pages in your hand, if you will turn to Rule 14, I would like to make the beginning of this talk very short, and I hope I will make that hold true all the way through. I group this Rule 14, so far as it is applicable to what I am going to say, as follows: A defendant may serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or any part of the plaintiff's claim against him.

In the first place, I would like to call your attention to the fact that there is no provision whatever for such an impleading, if you would call it that, by the plaintiff. The privilege is given entirely to the defendant. Hence, under this particular rule 14, the plaintiff could not by any stretch of the imagination make the insurance company a party defendant to the lawsuit as an original proposition except, of course, in those states where under the state practice the plaintiff may

make the defendant insurance carrier a party defendant to his cause of action. In the very great majority of states, of course, that is not true and, in my humble opinion, it shouldn't be true anywhere.

Under the plain language of this rule, I think we will all agree that a defendant has the absolute right to make his insurance carrier a party to the lawsuit brought against the individual defendant by the plaintiff, because certainly the liability of the insurance company to the defendant for all or a part of the claim asserted against him by the plaintiff is present and also under the language of practically every insurance policy now written, the insurance company, in addition to its liability to the defendant, has a liability to the plaintiff as well. Therefore, to me, at least, it is too plain to be argued that a defendant so situated may make his insurance carrier a party to that action.

There arises to me, at least, at once the most interesting question of whether that practice, if and when followed, would not substantially supersede all of the proceedings that we have heretofore had and with which all of us are in some degree familiar, of the declaratory judgment action. The only thing to prevent that would be the declaratory judgment action being filed by the insurance company before the plaintiff's action was filed against the individual defendant, or before the plaintiff's action was filed against the insured. Many times the insurance company doesn't have sufficient facts to justify the filing of a declaratory judgment action before the original action is filed by the plaintiff against the insured and therefore this particular rule would furnish adequate means and adequate inducement, which I will discuss in just a minute, for the insured not only to get a determination of the liability of the insurance company but also to protect his own hide by doing what you and I would call, I think, "sicking the plaintiff directly onto the insurance company" by a third party proceeding. In such a case, all that the insured has to do is to name the insurance company as a third party defendant and call upon the plaintiff to assert his claim against that third party defendant, as this rule specifically provides, and it would indeed be the millennium if the plaintiff didn't accept that opportunity when it was offered to him.

There wouldn't be but one obstacle in the way and I don't think you would find that in one case in 100 and that is where the insurer was not subject to the jurisdiction of the court within which the original action was pending. That is the only opportunity that I can see for the insurer to get away from this third party action.

The surprise to me is—as suggested by Mr. Hemry here, the answer may be the same—that this Rule has not been used more by insureds to bring the company into the litigation.

I had a case very recently presented where an insured had a default judgment against him for $40,000. He was insured up to $10,000. He settled the $40,000 judgment on his own terms and then asserted a claim against the insurance company. If he had been advised of this Rule, that is, if he or his counsel had been advised of this Rule in the beginning, the insurer would have been in that litigation long before any judgment was taken against the insured in any way at all.

Now, the reason for that may be that there has been a common understanding or agreement that that thing wouldn't be done. I don't believe that at all. I think the reason for it is that it just hasn't been hit upon as one of the real possibilities.

MR. RANDALL: Isn't there some provision in the contracts, or many of them, that you won't do that?

MR. HOBSON: In the insurance contracts? None that I have ever seen. I would be glad for anybody to show me one. You haven't anything like that, have you? I would be delighted to see one. I have never seen one yet. I would be very glad to be advised about that.

MR. KING: Wouldn't that be provided for by the contract that provides that the insured's company shall have charge of the litigation? That it is in the insurance company's hands?

MR. HOBSON: Well, of course, that is a very broad statement that you are making, that the insured turns it into the insurance company's hands. He doesn't do any such thing. The provisions of the policy are not nearly so broad as that, and the insured always has his own individual rights to protect. For instance, there may be a very serious question of coverage. There may be a very serious question as to the amount of coverage, assuming that there is coverage.

MR. KING: Well, your situation, then, you mean to apply where the insurance company would claim there is no coverage?

MR. HOBSON: I think my situation applies to a situation where there is or is not any question about coverage, either as to the existence of coverage or to the amount of coverage. Now, I am thinking right like you are, I think, that that is a very drastic situation and one that is full of grief for all insurance companies.

MR. FIELDS: If the insurance company knows it is a case where there is no question of coverage, they are in control of the suit anyhow. Their attorneys have appeared and the assured has contracted to give them the control of the case.

MR. HOBSON: That is right.

MR. FIELDS: So doesn't your problem merely, then, narrow itself down to a case where the insurance company denies coverage?

MR. HOBSON: Certainly it does, as a matter of technique, but as a matter of practice and practical effect, when there is no question of coverage at all, the insured doesn't question the fact of coverage in any wise at all but, in collusion with the plaintiff, he makes the insurance company a party for the sole purpose of assisting the plaintiff to beat them, that is the danger in it.

MR. HOCKER: Isn't he likely to void his coverage altogether on that?

MR. HOBSON: On the ground of lack of cooperation?

MR. HOCKER: Yes.

MR. HOBSON: I doubt it.

MR. KING: There is one more thing, it seems to me. Now, I am representing the insurance company and it has been sued and the insurance company has instructed me to represent it and the citation is turned over to me. Now, if I say, "Bring in the plaintiff," won't I be in the position of suing myself? That is to say, the insurance company has got counsel that is going out and suing itself in the premises.

MR. HOBSON: Don't misunderstand me. Of course you are not going to do that.

MR. M. E. WHITE: Suppose the coverage is only $5,000 and he is sued for $50,000 and you invite the insured to come in with independent counsel to protect himself and they insist on bringing in the insurance carrier? That is one of the questions.

MR. HOBSON: Or another question, Mr. White, could very easily be suggested, as some of us have had sad experience with. The insurance company may not be wholly solvent and, to meet that eventuality, the insured may want his own counsel in there to look after his interests rather than the counsel of the insurance company.

MR. LON O. HOCKER: Doesn't the fact that you bring the insurance company into the picture openly perhaps account for the fact that this hasn't been used more?

MR. HOBSON: Well, Mr. Hocker, I think that is perfectly true and would justify the non-use of the procedure, except in a case where there was actual collusion between the insured and the plaintiff, where his sole desire was to hook the insurance company.

MR. LON O. HOCKER: I was thinking of the general run of cases, that that fact might account for the lack of its use.

MR. HOBSON: I think probably that is true, and it is an assurance of the good faith and bona fide honesty of our assureds. It has an added value for us there.

Secondly, if that is done, that is, the insured files the third party action against his insurance carrier, my own idea is that the proper way for the court to handle that third party action by the insured against his own insurer is to separate that entirely from the plaintiff's claim against the defendant and try out that issue either in a pre-trial conference or as a separate issue, wholly dissociated from the plaintiff's claim against the original defendant. That particular question has not been passed on so far as I can find.

MR. LON HOCKER, JR.: Excuse me, Mr. Hobson. I think it was passed on in this case of Tullgren vs. Jasper, 27 Federal Supplement 413, by Judge Chestnut, only in dictum. He said: "But in case the insurer denies liability and refuses to defend the action in accordance with its policy, I see no logical reason to deny to the insured, who is the defendant in the suit, the right to bring in the insurer as a third party defendant where, under the terms of the policy, it will be liable over to the insured defendant and where the judgment against the defendant will establish the liability of the insurer."

Of course, in such a case the defendant insurer is entitled to a hearing in the trial of any defense that it may set up against its liability and it is probable that the court would order a separate trial of its controversy with the insured under Rule 42 (b).

MR. HOBSON: I think that is perfectly clear.

CHAIRMAN BENOY: I think we ought to let Mr. Hobson finish his discourse and then we will pounce on him.

MR. HOBSON: Somewhat akin to the question that we have been discussing, and a little bit off the subject, but I think closely enough associated with it to attract interest, is the tendency of the courts in the later years to abrogate entirely the principles of liability and primarily non-liability where there is insurance coverage, and that is another phase that will, to me, at least, hasten the time when the lawyers will use this Rule 14 to bring in the insurance company as a third party defendant.

For instance, a child is injured by the negligence of the parent. Quite a number of states have said that if that parent is covered by liability insurance, there is no public policy which demands that the parent be not sued by his child. The same is true of husband and wife cases. In Kentucky, we have had very recently the most marked illustration of that. A county, being an arm of the state, is a governmental agency and hence cannot be sued, and there is no way under our law by which that consent can be given except a general consent to sue all the counties. In this instance, the county board of education operated its own school buses and one of the students in the school was injured by reason of the negligent operation of that bus and sued the county. The lower court sustained a demurrer to the petition on the ground that they had held time and time again that the county was not liable under such circumstances. In the petition in that case it was alleged that the county, pursuant to an act of the legislature, had contracted for and obtained liability insurance to the extent of $5,000 for injury to one person. The court of appeals reversed that judgment and held that that cause of action could be maintained against the county and, strangely enough, wrote into the opinion this proposition, that while the cause of action could be maintained against the county, it could be maintained against the county only to the extent of the insurance coverage. So that what they were writing was a liability against the insurance company, which wasn't even a party to the litigation and couldn't become a party to the litigation.

Now, if you take a situation of that kind and put it into the federal court, where Rule 14 is applicable, you can very easily see that the insurance company can quickly be impleaded as a third party defendant.

I think that is all I have to say.

CHAIRMAN BENOY: That was an interesting discussion.

Now, I have one other matter I want to take up here before I let you loose on those fellows. Is Mr. Brody of Chicago in the room? I asked Mr. Brody to come in to discuss a situation which has been illustrated and demonstrated by what Mr. Hobson has said. In Ohio, we have a statute which provides that the action in tort proceeds to judgment against the insured and then all questions as to the tort liability and amount of damage are conclusively settled against the insurer. If that judgment is unpaid for 30 days, the plaintiff may then make the insurance company a new party defendant, the third party defendant, in other words, and proceed against the insurance company to determine whether or not there is insurance available for the payment of the judgment. It provides that that shall be done by supplemental petition upon which a new summons shall issue and the case shall then proceed as if it were an original action at law.

In the Federal District Court last November, 1942, (there were two cases), the Seligmachers had obtained a judgment against an insured and then they made the insurance carrier a party defendant. The Seligmachers were non-residents of the State of Ohio and the defendant was a non-resident of the State of Ohio, but service had been secured in Cleveland. The insurance company was not a resident of the State of Ohio. Summons was issued and served against the defendants outside of the state. The defendant insurance company appeared for the purposes of questioning the process and made a motion to quash the service of summons, which the court sustained, but he took th's position, that the United States courts are bound by the rules of civil procedure (that is in Rule 1), and are therefore not obligated to follow state procedure. That they should, however, give effect to the state rules of practice if not inconsistent with the federal rules, (that is Rule 15 (d), especially when such practice serves the ends of established federal law; and that attorneys by appearing for the insurance carrier and defending the case for the insurance carrier, had entered the insurance company's appearance in the suit and was therefore subject to the action in the federal court at Cleveland without further service of summons.

That was a case that I thought I would ask Mr. Brody to explain to you.

Now, we had another matter develop during the discussion and I would like to have Mr. Hocker, Senior, tell us anything that he has to say concerning this case in which he was concerned, Fisk v. Wallace.

MR. LON HOCKER, SR.: That was a suit to have the court fix attorneys' fees for services of a lawyer who brought a fund into court, the old Franz litigation as we know it in St. Louis. Franz was a poor German and he bought 210 shares of American Air Thermometer Company which grew into eighteen or twenty million dollars in Burroughs Adding Machine during the period when it developed. He died and left some heirs and there was a lot of litigation and Wallace was the lawyer who represented the person who initiated the litigation and he was suing to apply the fund, which the court had jurisdiction over, to the payment of his fees. I represented Wallace, who, by the way, was a very expert practitioner in federal procedure. He knew more about it than any lawyer I ever knew, so I didn't bother myself very much about the federal procedure end of it but devoted myself to getting a judgment on the merits.

We obtained a judgment for $66,000 against these particular heirs and within the 10 days there was an appeal taken by the plaintiff, I think on the 9th day. On the 10th day, Wallace filed a motion under the new Rules to amend the finding of the court, asking the court to increase the amount from $66,000 to some other greater sum.

The court held that under submission for some time. In the meantime, of course, the plaintiff, within the 10 days, had taken his appeal from the $66,000 judgment, and within 90 days from the time the court overruled Wallace's motion to amend the judgment by having it increased, he undertook to appeal, and there were motions to dismiss the appeal filed by each side and the court dismissed Wallace's appeal because he had not taken it within the 90 days from the original judgment but 90 days from the time when the court had overruled the motion to amend.

We presented that case upon the theory that plaintiff had prematurely appealed; that we had an absolute right to 10 days' time within which to file this motion for a new trial or motion to amend, and the court, I think, in the final decision, said that we should have appealed ourselves when the plaintiff appealed and then raised the question there and then the case could have come back, but it seemed to me that that was a useless waste of time and an abuse of procedure, that we should have to take an appeal when the court was bound to consider our motion to amend, it having been filed within the period of the rules; but they held, following the old practice more or less, that the court had lost jurisdiction by reason of this appeal and that our time, of course, dated from the original judgment.

Now, I haven't reviewed the facts but I think you gentlemen perhaps can get the point that is involved.

CHAIRMAN BENOY: Thank you, Mr. Hocker.

That, I think, is one of the difficulties that you find in the interpretation of these rules. It was in New York, as Mr. Hemry mentioned, that the most of these adverse decisions on Rule 34 have come from, and there they recognized that practice before the rules were established and that accounts for the disastrous construction that they have placed upon it.

Now, let's open up for questions on Rule 14.

MR. HENEGHAN: I would like to ask the last gentleman something. Two years ago I had a paper on this subject of Rule 14 and tried to study Rule 14 as best I could and this sentence here caused me some concern: "The plaintiff may amend his pleadings to assert against a third party defendant any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant."

Now, do you think from your study of this that that constitutes a limitation on the preceding sentence that the plaintiff is limited to a cause of action that he could have asserted against the defendant in the first place if the plaintiff never had any cause of action against the insurance company? If that constitutes a limitation against the preceding sentence, it would constitute a limitation against the plaintiff suing the insurance company, which is something that is highly to be desired, and if that does constitute a limitation, then they couldn't join the insurance company under this Rule 14, but I will admit the preceding sentence would indicate that the situation is true that they can join the insurance company.

MR. HOBSON: Aren't you overlooking the fact that that limitation applies only to the plaintiff? The defendant may have an actual controversy with the insurance company and he can try out that issue.

MR. HENEGHAN: I agree to that, but I was wondering why that was put in there, that the plaintiff himself is forbidden to amend his pleading so as to join the insurance company as a third party defendant. It is not consistent with the rest of the paragraph.

MR. HOCKER, JR.: Mr. Heneghan, that seems to have been tactily passed by. I think your question is a very pertinent one.

MR. HENEGHAN: I knew you would know that when you saw it.

MR. HOCKER, Jr.: I considered that, too, but in this Tullgren v. Jasper, Judge Chestnut never considered that at all in saying the third party defendant could bring it in and the plaintiff could replead against the defendant.

MR. HENEGHAN: Thanks, Mr. Hocker. I know that from studying that, you would have noted that.

MR. HOCKER, JR.: I can't imagine a case, in the absence of some problem of coverage, where the plaintiff would sue the third party defendant insurance company.

MR. HENEGHAN: I can't either, unless they wanted to be collusive.

MR. M. E. WHITE: In some states, don't they sue the insurance carrier right along with the defendant?

CHAIRMAN BENOY: That is true, I think, in Alabama and in Wisconsin and Oklahoma.

MR. HOCKER, JR.: That is correct.

MR. YANCEY: It was true in Alabama but it is not true now.

CHAIRMAN BENOY: Mr. Yancey, do you have some controversy up about third party practice now? Have you anything you want to add to this?

MR. YANCEY: No, I haven't, but the complaint I have with it is that some courts are inclined to hold that the bringing in of a third party defendant depends a lot on the plaintiff. For instance, a plaintiff obtains a judgment against two tort-feasors. He gets a judgment against both. In Alabama there is no contribution between tort-feasors. Now, one insurance company or one defendant can make a deal with the plaintiff or his attorneys and arrange it so, apparently, when they file a bill to collect against the insurance company, as they can in Alabama, and you remove it to the federal court, some of the courts hold that whether or not you can bring in a third party or bring in the other insurance carrier or the other concern depends on the plaintiff, whether he wants you to or not.

Now, in my judgment, the act should be so that it would not be dependent on the election of a plaintiff and be subject to a deal of that character. So far as Alabama is concerned, at one time you could join the insurance carrier, but that Act was amended to follow the Federal Act and our Supreme Court has held within the last few months that the insurance company cannot be joined in the initial suit. I don't know enough about the subject to really discuss this question very intelligently, but I am very much interested in it and I would like to hear more discussion.

CHAIRMAN BENOY: In other words, your point is, which is true, that if it is to follow that construction, the election of the plaintiff can defeat the application of the rule.

MR. YANCEY: The plaintiff can come in and say, "No, I don't want this other party in," and some of the courts have held that they can't be brought in. I mean the federal courts. The Louisiana court has held that you can, and I think probably in Pennsylvania and some other states. I don't recall them all just now, but quite a number of other states have held that if the plaintiff comes in and says, "No, I don't want to proceed against this fellow," then the defendant has no right to bring them in as third party defendants.

MR. HOCKER, JR.: Mr. Yancey, where the plaintiff is given the right to refuse to plead against the third party defendant, doesn't that contemplate procedure which will dispose of all the rights in one trial? That where it is possible to separate and have separate trials, although all in one suit under the third party practice, the fact that the plaintiff refused to plead against the insurance company or any other third party defendant that might be brought in wouldn't militate in any way against the decision by the same court of the rights as between the real defendant and the third party defendant where there could be separate trials.

MR. YANCEY: Well, I had a concrete case of that character where a judgment was obtained against two trucking concerns and one concern did not have coverage on the truck but they filed a policy with the Public Service Commission, and they had borrowed this truck from another concern and it was in a defective condition, according to the

jury's finding, and so they got a judgment, a rather substantial one, against both trucking concerns, one because they were operating the truck in a defective condition and the other because they permitted the truck to be operated in a defective condition.

Now, the complaint I have is this, that in Alabama, and probably in many states, after you get a judgment, then you proceed in equity against the insurance carrier to collect. All right. If one side or the other would make a deal with the plaintiff and his counsel, then when you get into the federal court and try to bring the other parties in for contributions or otherwise, then many courts, a number of courts, I should say, have held that if the plaintiff says "No," then you have no right to bring in that third party. I believe that the defendant should have an absolute right and the plaintiff should not have an election.

MR. HOCKER, JR.: You believe, then, there should be contribution between the joint tort-feasors.

MR. YANCEY: Yes, and in addition to that, in a court of equity, at least, the court should pass on the question and you should have a right to bring that party in and not let it be controlled by the plaintiff.

MR. HOCKER, JR.: Well, the rules don't grant you the right of contribution between joint tort-feasors in Alabama, of course.

MR. YANCEY: That would be subject to law, of course, but my idea is this. Regardless of that, I believe the plaintiff should not have anything to say as to whether or not you bring in a third party defendant. I don't believe it should be left to him or he should have any control over that right.

CHAIRMAN BENOY: If there are no more questions on Rule 14, let's take up Rule 34.

MR. FIELDS: I have just one more comment on Rule 14. I still can't see why there is any point to the question of third party, or of bringing in the insurer, the third party, unless there is a question of coverage. If the insurer concedes coverages, he has, by contract, control over the case and he isn't going to summon himself in as a third party, and the defendant, by contract, has relinquished any right to do that, even though he seeks to collude with the plaintiff, as Mr. Hobson suggested. I can see that it has a very definite application where there is a question of coverage, but if there is no question of coverage, I don't see that we have anything to concern ourselves about.

CHAIRMAN BENOY: All the plaintiff would have to do in such a case is to ascertain the amount of the policy limit and then make it a dollar higher and he would have it.

MR. FIELDS: Well, the insurance company still has control of the case.

MR. KING: He could make it for $5,000 and sue him for $50,000.

CHAIRMAN BENOY: Where the policy limits are $5,000 and the amount sued for is $50,000.

MR. HOBSON: But you don't contend that under the policy the insurance company has exclusive control of the litigation, do you, to the exclusion of the insured's right to have his own counsel?

MR. KING: Within the limits, it would, but if he goes above the limits—

MR. HOBSON: No, sir. The insured has a right to his own counsel, absolutely.

MR. HOCKER, JR.: No.

MR. KING: The insured does have the right, even if the suit is entirely within the policy limits.

MR. HOBSON: He doesn't have the right to control the course of the litigation, or to settle, but he does have the right to his personal representative.

MR. KING: Do you think that personal representative would give him the further right to bring in the carrier, notwithstanding he had been sued under the amount of the coverage of the policy?

MR. HOCKER, SR.: Isn't the answer to that that these contracts are subject to all lawful rules that may be imposed by any body like a rule-making body, like the legislature?

MR. HOBSON: Sure they are.

MR. REMKE: Mr. Chairman, what about the prejudice that might be started because an insurance company is made a third party? We all know that just as soon as an insurance company is mentioned in the case, there is likely to be a verdict against the defendant. The defendant isn't paying the money and all kinds of prejudice arises by even mentioning the insurance company. That hasn't anything at all to do with the merits of the case.

MR. HOBSON: That is the reason I suggested, Mr. Remke, that that would most

likely be handled by a pre-trial conference or, if not, by a separate trial and a determination of the issue between the third party plaintiff and the third party defendant insurance company.

MR. REMKE: That question is a matter of a case in tort. When you bring in the insurance carrier, you have a case in contract. You have got a messy situation just as soon as you allow the insurance company to be mentioned.

MR. HOBSON: That is right, and you separate them.

MR. REMKE: There ought to be a separate trial.

CHAIRMAN BENOY: Are there any questions on Rule 34?

MR. M. E. WHITE: Suppose they proceed to take the deposition through the insurance adjuster and the insurance adjuster is put on the stand and he is asked whether he has certain letters or not. Suppose he has turned his file over to the attorney and he says truthfully, "I don't have it. I haven't any records at all."

MR. HOCKER, JR.: Well, that was Hemry's rule, but I am perfectly glad to answer it. I say if you leave the rule as it stands now and don't amend it or don't amend it by judicial interpretation or by amendment of the rule itself, you are going to force such dodges as that. That insurance company is going to have a lot of undercover investigators that nobody ever heard of and their files are going to be in somebody's brain instead of on paper. I think you are right.

MR. HEMRY: That case happened, and the attorney I think went about as far as anybody possibly could. That was the case I mentioned, the leading case that held against the insurance companies, and that case involved three written opinions by the Federal District Court of the Southern District of New York, one opinion by a district court in Pennsylvania, and a ruling by the C. C. A. in Pennsylvania, all of those decisions on that just because the attorney was trying to do exactly what you are talking about, and finally the judge got disgusted as could be and told him, even though this statement had already been put in the record, in the deposition previously, "I am sick and tired of your fooling around; you bring it in here now anyhow."

This fellow was quite resourceful. First, the insurance adjuster would say, "Well, I don't have it; I gave it to the attorney." Then the attorney would say, "No, I gave it to the insurance company," and this was just kicking back and forth and the judge just said, "Well, now, put up this thing. It is within your control. Get it."

So I doubt whether the federal court would let you get away with too much, and that was one of the things I had in mind when I indicated that some of these decisions against us on these points had extenuating circumstances which made the sympathies lie with the moving party trying to get discovery.

MR. M. E. WHITE: The point that I was trying to make was trying to force the plaintiff then to proceed under Rule 34 with notice of motion, so that then you can have the court pass on it. The unfair thing is to put the adjuster on the stand or be in somebody's office 100 miles or 75 miles from where the trial judge is sitting, or the court is, and have the attorney ask all kinds of questions, leading questions and otherwise, and dig out everything you have got and ask him to produce this letter and file it. I have had that very thing happen and that is exceedingly unfair. You don't have any opportunity to be heard, as Mr. Hocker said. Now, if you can force him to give you notice and to appear before the court and then have the court pass on it, you certainly at least have had a chance to argue the question. Otherwise, you don't.

MR. REMKE: Wasn't the question of privilege presented in those cases?

MR. HEMRY: Yes, the question of privilege has been presented in nearly all these cases, but it is a general matter and they have ruled that if it is an opinion given by a client to his attorney, O. K., that is privileged. There have been some statements from which you might draw the inference that if the attorney took the statement from the witnesses, that that might make a difference. There are no rulings that actually hold that way.

MR. REMKE: We have in Ohio, two of them.

MR. HEMRY: Under the Federal Rule?

MR. REMKE: No, under the Ohio Rule.

MR. HEMRY: You mean where the attorney actually took the statement. Well, there is some language in some of the federal decisions in which they distinguish. They say, "This statement was taken by an insur-

ance company adjuster; it wasn't taken by the attorney; therefore, he has to put it up." But there are no federal cases that I have found—and I think I have seen them all—that actually have said, "The statement was given to an attorney; therefore, it is privileged."

MR. HENEGHAN: As Mr. Hemry pointed out, the construction that has been placed upon it by the court is really vicious.

CHAIRMAN BENOY: I feel that we need amendments, and the principal ones we are concerned with are 14, 34 and 49, as I see it.

OPEN FORUM

Air Transport Insurance

Chairman: E. SMYTHE GAMBRELL, *Atlanta, Ga.*

DISCUSSION LEADERS

PAUL M. GODEHN
General Counsel
United Air Lines
Chicago, Ill.

JOHN M. BREEN
Staff Counsel
Lumbermen's Mutual Cas. Co.
Chicago, Ill.

PAUL REIBER
Member, Legal Staff
Civil Aeronautics Board
Washington, D. C.

THE Open Forum Discussion on Air Transport Insurance of the International Association of Insurance Counsel was called to order at 2:30 Tuesday afternoon, June 29, 1943, in the Berwyn Room of the Edgewater Beach Hotel, Chicago, Illinois, by Mr. E. Smythe Gambrell, Atlanta, Georgia, who presided.

CHAIRMAN GAMBRELL: President Smith of the Association wrote me in April asking if I would make a talk at this meeting on the subject of "Air Transport Insurance." I told him I'd be very glad to. Later he wrote that he had concluded a forum would be, perhaps, better than a formal talk, and asked if I would agree to join in such a forum. So I am here at his request. We have, as associate discussion leaders, Mr. Paul Godehn, a member of the firm of Mayer, Meyer, Austrian and Platt, General Counsel for United Air Lines, Mr. John Breen, an insurance staff lawyer and executive of this city, and Mr. Paul Reiber, a staff lawyer for the Civil Aeronautics Board in Washington. The four of us have promised to say a few words at the outset this afternoon to stimulate some thought and discussion in this new field.

Since aviation insurance is a new subject, not a great deal has been formally said or written about it, and we are going to have to be very informal this afternoon. At the outset, it seems to me it might be well for us to consider the aviation industry—its importance—and then the basic reasons for being concerned with aviation insurance. It has been my pleasure for about twenty-one years to be an insurance lawyer and for about fifteen years also to be an aviation lawyer. I think I can say, without exaggeration, that we are on the threshold of tremendous developments in air transportation.

Up until the war the commercial airlines of this country had something less than 400 airplanes in regular service. They had only a few thousand regular commercial pilots. During the war it has been necessary for the government to take over about half of the existing planes used by the airlines—so the airlines now have something less than 200, but their load factors have been increased and they are today hauling about as much traffic as they did before the war.

So, from less than 200 airplanes at this time, I think it is safe to say that within two or three years we propably will have more than 2,000 commercial airplanes on the domestic routes of this country. In other words, I see perhaps a tenfold increase in the number of airplanes and, perhaps, more than that in the number of flying personnel in the industry within the next two or three years. That is the commercial outlook for the industry.

We know that there are 50,000 or 10,000 young men who have learned to fly in the last year or two, and who are going to want to come back from the war and get into the aviation industry. We know that the capacity for manufacturing aviation equipment has

been multiplied manyfold. We know that the public has become educated to aviation and people generally want to fly.

Now, aviation, as I see it, is not a narrow and single track business, but it is a concert of a good many businesses, all funnelling into the aviation industry. The aircraft manufacturer is an essential part of the industry. The rubber manufacturer, the radio manufacturer —a great many businesses all have close relationship to the aviation industry, as a whole. Those allied industries have been working very hard, conducting splendid and extensive research, in an effort to make their fullest contribution to the general aviation industry and to air transportation.

The Federal Government has recognized the supreme importance of developing aviation in the adoption of its Act of 1938, and the government stated in the declaration of policy that it was the desire of the government to foster, encourage and develop air transportation in this country. It is rather unusual for the government to single out an industry for special encouragement, but that has been done in several instances in connection with legislation on aviation. So I think there is every reason for all groups having relationship to the industry, or being in any wise interested in it at this time, to begin seriously to consider making the greatest possible contribution to its progress.

The industry, naturally, has had its impact on law. The law of torts, the law of property, the law of public utility regulation, all have been touched by aviation. For instance, the supposed ownership by a person of the space above his land has been pretty well exploded in recent years, and decisions in various parts of the country in the last ten years have indicated that a man does not own to the sky. Questions of tort liability have been up for consideration in connection with aviation.

There has been the suggestion that aviation is such a special industry and so novel in many of its implications that ordinary, common law, that is, substantive law, and the usual procedural law, in some cases possibly ought to be modified to take care of aviation and aviation accidents.

Some twenty years ago various bodies—I mean professional bodies—got together and began thinking about drafting special codes for the regulation of aviation, legalizing flight, and imposing liability in respect to accidents; but before the codes could be brought to completion the industry, in most cases, had outrun the thinking of those in charge of those codes. I know that about 1935 the Conference of Commissioners on Uniform State Laws and a committee from the American Bar Association, thought they had a satisfactory uniform code for adoption by the States for regulation of air transportation, and it was found that before the recommendation for adoption was made the code had been outgrown in many respects.

In 1938 the Federal Government passed the first comprehensive law, regulting both the economics and the safety of air transportation.

As the industry has grown there has been a growing conception of the importance of dealing with air transportation on a national basis. It has been generally felt by those familiar with the industry that it had to be integrated on a national basis, that forty-eight different sets of safety regulations and forty-eight different sets of economic regulations regarding franchises and rate making and so forth, would be intolerable in an industry which crosses state lines as the aviation industry does.

The Civil Aeronautics Act of 1938 created a Civil Aeronautics Board, which is a little Interstate Commerce Commission for the air, dealing both with economic matters and with safety matters. That Civil Aeronautics Board has been functioning now about four years. The industry has experienced great growth under the regulation of that Board.

There is pending now before Congress the so-called Lea-Bailey Bill, designed to improve and perfect the old Act of 1938. Most of the recommendations in the Lea-Bailey Bill, I believe, are not the subject of controversy at this time, although in some particulars there are controversial provisions.

Aside from the Federal regulation—that is on a national basis—there has been a good deal of international law-making by convention or treaty. You probably have heard of the Warsaw Convention and the Rome Convention. There have been a good many conventions, some of which this country has had a part in, and some not.

Of course, when this country makes a treaty with respect to any matter, that treaty is the general law in this country, binding on Congress as well as everyone else. So we have, in respect to international flight, under the Warsaw Convention, certain limitations with respect to the amount of liability for

accidental injury. We have, under the Warsaw Convention, also, absolute liability in respect to certain kinds of damages that are sustained.

More recently, that is, in June, 1941, the Civil Aeronautics Board published the results of a study which had been conducted by some members of its staff under the leadership of Mr. Edward Sweeney. That report, called the Sweeney Report, is available at the office of the Civil Aeronautics Board in Washington.

The Sweeney Report attempted to deal with aviation from the factual side and to review tort law and consider ways of adapting the common law and the customary procedure of courts in this country in the trial of law suits to the peculiar nature of aviation accidents and, in considerable measure, the Sweeney Report recommended the adoption of the provisions of the Warsaw Convention.

That is, it recomended, for instance, that persons or property injured on the ground, away from airports, by an airplane casualty, would be entitled to compensation as an absolute right. It recommended that passengers in common carrier operations should be entitled to the highest degree of care, and that the burden should be on the carrier to establish the existence of the highest degree of care, in order to avoid liability. It recommended that, in respect to private operations, ordinary care only would be required, but even there the burden of proof would be upon the carrier. There are many other details of those recommendations, but they all point somewhat to the thinking that is going on in this country at this time in relation to aviation.

What I say here this afternoon is merely an expression of my own private views. I am not speaking for any insurance company or any airline. My best hope is that we may say a few things that will stimulate you to thinking and talking and asking questions this afternoon, and it may be this meeting will generate the nucleus of thought that will develop into something substantial in the years ahead.

It seems to me that this Association probably is going to want to have a discussion like this almost every year, from now on, to keep up with the rapidly moving events in the air transportation industry, and to enable the lawyers to do, in the field of the law, for aviation, what the engineer is doing in the field of manufacturing motors or radio equipment, and so forth. Certainly, aviation is demanding the best brains and closest concentration possible in the engineering field. It is my sober belief that aviation ought and will have comparable research, thought, attention and action on the part of the lawyers from now on.

I don't believe that airplanes will come quite so rapidly as small automobiles came, but I do believe that the growth will be comparable to the growth of the automobile industry, and that lawyers in the field of the law and insurance people in the field of insurance are going to be expected and required to make their appropriate contribution to this rapidly growing industry.

Now, I said the Sweeney Report made certain recommendations regarding liability and regarding proof, and so forth. The Sweeney Report also recommended compulsory insurance for certain types of flying. I think most of us have our private views regarding compulsory insurance for automobiles. I have always been somewhat opposed to compulsory insurance in the case of the private automobile, although I believe all of us realize that in respect to the public service automobile, and certainly in respect to the public service airplanes, there ought to be compulsory insurance. Maybe there ought to be insurance in respect to all airplanes. That is a big subject that is up for discussion at this time.

Now, the Lea-Bailey Bill, which is pending before Congress, but will not be acted on before the summer recess, had in its original draft some provisions regarding absolute liability, in certain instances, and some provisions regarding the limitation of the amount of liability, and it had some provisions regarding compulsory insurance.

In the redraft and in the draft that was reported out by the Sub-committee of the House, those formal provisions have been eliminated and in their stead have been inserted provisions that the Civil Aeronautics Board shall constantly study the insurance situation in respect to aviation, and shall make reports on the availability of airplane insurance and recommendations for further insurance if the required insurance is not available.

The Air Transport Association—which is the trade association of the airlines in this country—instructed its staff to make a study of insurance in relation to air transport some months ago. That study was completed and published, I believe, in March of this year.

It contains a good many recommendations regarding rates, the desirability for uniform policies, questions of brokerage and other services, reinsurance, and so on.

I don't believe that it would be appropriate here for this group of lawyers to undertake to go extensively into what might be termed the economic or business side of insurance. That subject might more properly come before a body of insurance executives rather than before a body of insurance lawyers.

I mention that report which, of course, has not been finally passed upon by the Air Transport Association, but merely represents a study made by some of its staff members—I mention it because it may indicate in some way the thoughts, at least, of a good many people regarding the present insurance situation, and the needs for certain changes and improvements in the insurance field, just as we need right now improvements in radio, improvements in engines, and improvements in airports, and improvements in everything that has to do with the aviation industry. Things which were entirely adequate, or seemed so, yesterday in the industry are obsolete today, whether it be an airplane or an instrument or an airport or any other part of the industry. So, when we look at aviation insurance, it should not be felt that we are singling out insurance as a whipping boy or as an industry which deserves any particular criticism or fault-finding.

It is my pleasure, from time to time, to meet with engineers who are working on different phases of the industry and it is encouraging to observe that in all these fields those who are the leaders are quick to realize that the best has not been achieved, and that it behooves everybody in each of these allied industries to improve on today's arrangements by better arrangements tomorrow.

Now, I am not going to say more at the outset than that. We have the good fortune, as I say, to have three others here with us today, and I am going to ask each of them to say a few words, after which it will be our pleasure to have comments and questions from anybody attending this meeting, and we will, in a non-controversial and frank and open discussion, receive the questions and do the best we can to answer them.

I am going to ask Mr. Godehn, of the Chicago Bar, General Counsel for one of the largest airlines in the country, to say a few words from the standpoint of the air carrier.

DISCUSSION BY PAUL M. GODEHN

This problem of aviation insurance and the related problem of civil aviation liability have been discussed and talked about for many years. The airlines have investigated the problem thoroughly and the Civil Aeronautics Board, as Mr. Gambrell mentioned, did a very comprehensive job in the Sweeney Report.

The problems will certainly be accentuated and become very much more important than they are today when the war is over. I have not enough foresight to predict the future of aviation, even two or three years from now, but I feel sure of some things. One is that when the war ends a number of the airlines of the country will acquire, as promptly as possible, four-engine equipment which will carry a great many more passengers than the DC-3 airplane commonly used now can accommodate.

I don't think that will increase hazards in aviation. On the contrary, I think there is an element of safety in four engines which will have the opposite effect However, that does not alter the fact that the result of an accident with a four-engine airplane, filled to capacity, will be much more serious than it is with smaller equipment, and especially so if an accident happens to occur in one of the states—I think there are about seventeen of them, where they have no limit on the liability for wrongful death.

Another thing that I think will happen pretty promptly after the war will be a great increase in cargo transportation. I think it is quite likely that there will be a substantial reduction in air express rates as soon as the airlines can get ships to operate as exclusively cargo ships. With express rates as they are today there are not so very many commodities that can afford to pay the much higher price than you have to pay for rail express, because they don't require that speed in transportation; but a reduction in rates will open up a whole lot of new commodities that have not heretofore moved by air express.

Then, as Mr. Gambrell mentioned, there is certain to be an enormous increase in private flying. That is due to the fact that we will have a great many young men who will know how to operate an airplane, and it will be helped along by the fact that the airplane manufacturing companies will be looking for an outlet for their capacity. I think they will get busy designing planes for commercial airlines and, at the same time, try to

produce a good small airplane that can be purchased by a man of ordinary means.

That increase in flying, in a way, will increase hazards because it increases congestion in the air. Airport congestion is a problem, even today. I think before the war started LaGuardia Field of New York had something like 260 schedules a day, which is quite a problem, particularly in bad weather when you have to bring planes in with instruments.

Now, that increase in aviation, in my judgment, makes it more important than ever that some solution be found for this question of civil aviation liability. I am firmly convinced, myself, that the problem is not one that can be satisfactorily handled by state law. Attempts have been made to draft a uniform state law on that subject. You run into difficulties in states where they have a constitutional prohibition against the limitation of liability by the legislature for damages recoverable for wrongful death.

Then, another thing, it takes a long time to put a uniform law through state legislatures, even though all public bodies, such as the Bar Association and others, are back of it, and the states modify the language in uniform acts and when you get through you haven't got anything.

I think federal legislation on the civil aviation liability is a desirable thing for all interested parties. It seems to me it is desirable from the standpoint of the insurance company, because it can place a limit on the extent of the risk you insure. For a similar reason, it is desirable for an airline, and I think it is likewise desirable for the claimant, to be relieved of the enormous difficulties of proof that are encountered often in aviation accidents, and that he would be better off if he had a known liability, even if it were a liability without fault, then to have to litigate the question.

MR. LLOYD: May I ask Mr. Godehn a question? I am just wondering, don't you feel that the airlines are going to be virtually absolute insurers of their passengers, the same as the railroads are? When I say virtually, I mean just that—that it is going to be a jury question which virtually makes it an insurer.

MR. GODEHN: Some people have advocated that legislation on this subject should change the burden of proof so that an injured passenger or the estate of a deceased passenger can make out a prima facie case by proving merely that he bought a ticket and that he was injured or killed, and then it is up to the airline to prove freedom from negligence. I think we will either arrive at something like that or we will arrive at absolute liability, irrespective of fault, either one or the other.

CHAIRMAN GAMBRELL: We expect to have a good deal of discussion at the conclusion. If anyone feels that he particularly wants to interrupt the speaker or ask him a question when he finishes, very well. Otherwise, we will go through and then invite general discussion.

Next, I want to call on Mr. Paul Reiber, of the Legal Staff of the Civil Aeronautics Board in Washington. Mr. Reiber was assigned the job of heading up some study and research which the Board desired to make a year ago, and he has brought those studies pretty much, I think, to a conclusion. I believe it is desired that his remarks be not considered as reflecting any conclusions of the Board, but merely the conclusions of a member of the Legal Staff of the Board. They reflect certain things which he has told, and is telling, the Board about what he has found out. Mr. Reiber, will you say a few words?

* * *

DISCUSSION BY PAUL REIBER

When Mr. Gambrell first wrote me and suggested that I discuss aviation insurance from the government's point of view, I mentioned that to one of the government intellectuals. He said, "That is wonderful that Mr. Gambrell recognized that the government has a point of view." I don't want to get involved in some of those complexities. I'd rather say that if the government does have a point of view I would not be in a position to express it, and I would not be authorized to, if I wished to.

There are several things that are very interesting to me about insurance and aviation. First is the tremendous importance of insurance. I don't suppose I would have to tell that to some Insurance Counsel, but the language that impressed me was that which was dug up by the Board of Economic Warfare in some of its studies, and they turned to some Frenchman who said, "Germany does not need to take recourse to a mysterious organization of spies in order to be informed of our plans and to learn our resources and our production. She has only to consult with the bordereaux and bulletins which the insurance and reinsurance companies pile up in their

office through their brokers. These bordereaux and bulletins state the output of our factories, the machinery, the turnover, the rural population, what our vessels transported and where to they transport. It is easy to guess what advantage our enemy, by its own methodical spirit, can draw from these materials."

The tremendous importance of insurance as a weapon of war is illustrated in the reports, also, prepared by the Board of Economic Warfare, where they have traced the transmission of information concerning factories producing war materials in this country. They have traced the reports going all the way to Berlin, indicating exactly which factories are producing what and about what schedule, and they are following that kind of information from insurance bordereau reports.

Now, the second tremendous importance of insurance is its use as a commercial weapon. The insurance man knows, particularly in marine insurance — I will limit this illustration to marine insurance—who is selling the goods, who is buying the goods, the price of the goods, who is financing the goods, the cost of financing the goods, and the insurance man also knows how the goods are shipped, who is shipping them, when the ship leaves port, when it will arrive, and what course it takes. All those things are available to a marine insurance man, and in the past they have been used by foreign insurance companies to tremendous advantage.

In fact, one of the rules which the Germans instituted quite early in the present regime was that an insurance company which was not a German company could insure in Germany, but it could not take out any information without the special permission of the German government.

Now, having before us, then, these two important features of insurance, it is rather interesting to examine the American, so-called American, aviation insurance market and see how it has been reacting to the risks, the new risks, which are imposed by aviation.

As Mr. Gambrell pointed out, the Air Transport Association made a report which called the attention of the public to what they felt were shortcomings, and maybe we had better not dwell on something that might be as controversial as that.

However, there are two things that look rather significant, from where I stand. One of them is the tendency of the American companies to get together in a tight little network—I don't like to use the word "monopoly" and the word "cartel" is foreign to us—but, nevertheless, a group of insurance companies have gotten together, and by a series of agreements among themselves they tend not only to set the premium rates, which seem to be recognized by state laws as perfectly permissible, they not only set the premium rates in the state which authorizes them to do that, but they organize to set the premium rates for business which is not limited to those states, and maybe that is all right, too, although the Anti-trust Division of the Department of Justice has just recently filed suit and has indicated some southern insurance companies as violating the anti-trust laws for doing that.

The third kind of thing these insurance companies do — they make an agreement among themselves that they will not reinsure any other company doing aviation insurance business unless that company is approved of by the people now doing the insurance business. Now, we can raise the question there as to whether that is promoting a good American aviation insurance market. One of the questions that comes to mind is: should not the insurance companies who are now doing an aviation insurance business welcome other risk bearers, since we are told in theory that insurance companies like to spread the risk? Would it not be desirable to let more people come in, do the direct writing, and then let the American companies do the reinsuring? But the way the agreements now stand among the present people doing aviation insurance business, they will not reinsure a newcomer into the field unless he meets requirements which are not specified and from which there is no appeal, as far as I have been able to find.

Then, the second significant feature is the fact that it relies very heavily on foreign reinsurers. In the past five years, the three leading groups of aviation insurance underwriters, and all my remarks are concerning these three, because it is only about those that we have some detailed information, in the past several years those three insurance groups have been reporting their premiums to the New York Insurance Department, and of all the premiums written all over the country that were reported to the New York Insurance Department, these three groups wrote 97 per cent of the premiums, so when we talk about those three groups we are talking about

the leading aviation insurance underwriters in this country.

Well, during the past five years 65 per cent of the aviation premiums have been allocated to foreign companies. Now, the way the figure of 65 per cent was arrived at is, first, when the aviation groups take a certain risk on an airline or on a non-airline aviation risk, they reinsure a certain portion of it automatically abroad. Then, after they have sent part abroad as reinsurance, they retain the balance among themselves, and after they divide what they retain in this country among the foreign companies which are members of their groups, they retain only about 35 per cent in American hands, gross.

In view of the tremendous significance of aviation insurance to the security of the country and the tremendous significance of aviation insurance to the development of commerce of this country, it seems that is a factor which has to be considered by people interested in air transportation.

I will just give one illustration of how foreigners have used the insurance business to promote their own commerce. When a man in a foreign country seeks to send his goods into this country or anywhere else, he usually has to have it financed, and when he goes to his bank to have the matter financed he learns that he has to get an insurance policy. When he goes to buy an insurance policy he learns that quite often it makes a difference on which ship he sends his goods. Now, if he discovers that it will be cheaper for him to send his goods on a foreign ship, quite often he does that. In fact, the American steamship operator has wailed for many years that all the insurance that was managed by foreign insurance companies has been manipulated in such a way that he always came out on the short end of the bargain when it came to hauling goods to this country.

Furthermore, when the American steamship operator has been in a position where he needed insurance services, and insurance services are necessary, not only for salvaging your ship but they are very vital when it comes to satisfying the shipper sitting in Australia who wants immediate settlement when his goods are lost—it would be very desirable to have an American insurance company manage those salvage facilities or make those settlements; in fact, the American steamship operator has always felt that when foreign insurance companies were in on the services the American operator always came after the foreign operator had been taken care of, and, because of this tremendous power of insurance the Federal Government should have an interest. Just what they should do about it is something maybe you people will have some ideas on.

CHAIRMAN GAMBRELL: The last of our four preliminary speakers today is Mr. John Breen, of this city, who, as I stated, is a staff lawyer and executive of insurance companies headquarters in this city. Mr. Breen will undertake to say a few words from the standpoint of the insurance industry.

* * *

DISCUSSION BY JOHN M. BREEN

It seems to me that insurance has a very big responsibility toward the air lines and flying in general.

We are all agreed that immediately after the hostilities are over, there will be a tremendous spurt forward in commercial and private flying, such as there was in the automobile industry immediately after the last war.

That did much to rid the popular mind of the fear of risk in connection with automobiles and gave us what developed into the biggest single industry in the entire country.

The present war may do the same for aviation, both commercial and private flying.

However, as has frequently been said in connection with the automobile industry, you can build just so much safety into an automobile and into a highway, and you can police just so many miles before you finally reach a point where you can go no farther, and yet there will still be an element of risk remaining.

Likewise, one of the factors in delaying the earlier growth of aviation somewhat, has been the element of risk involved in flying. Great strides have been made in safety engineering and in enforcement of safety regulations, but a satisfactory method must also be available for handling the element of risk remaining.

In the case of the automobile, the problem which arose as a result of the risk incident to its use, finally reached the point a few years ago where, according to an article which appeared in 1936 in the American Bar Journal, approximately 50 per cent of all cases in our trial courts and one-third of the cases on appeal, involved questions of automobile law.

This fact alone showed that an important social problem had arisen, and if some satis-

factory and adequate means had not been established for compensating the people injured as a result of automobile accidents, the magnitude of the problem would have been alarmingly increased.

But a very satisfactory solution was worked out by providing complete and adequate insurance protection at a cost which made the protection available to almost every motorist.

STANDARD POLICY

The insurance business, I think, is to be commended for the satisfactory way in which it handled that problem. It did it by means of providing a standard contract, which is now almost universally and uniformly applied and interpreted throughout the entire country.

The parties which drew up this standard policy included both representatives of the leading insurance carriers and of the people, the latter being represented by the American Bar Association.

In connection with aviation, there are now available some carefully worked out insurance arrangements of quite a few years standing. But as yet no standard contract has been worked out.

Insurance should be prepared to step in immediately after the war, when the big business in commercial and private flying will inevitably take place, and provide a standard contract designed to take care of all the needs of the aviation industry.

This can be done in a way somewhat similar to that done in connection with the automobile, by the insurers and the representatives of both the industry and of the people, (in this particular case that probably would be the Civil Aeronautics Board) getting together and deciding upon a suitable contract which would take care of all of the important risks incident to the business.

AVIATION AND THE POST-WAR DEPRESSION

An interesting theory has been advanced by some economists, to the effect that whenever we have a depression in this country, it is necessary for some comparatively new industry to lead the way out by absorbing the excess of capital and labor which has caused the depression.

There is evidence that this theory is sound, as indicated by what occurred after the last war when a serious depression followed, and the automobile industry helped to lead the way out, by providing employment to hundreds of thousands and by absorbing excess capital.

These same economists look to the aviation industry to do the same for us after this war.

It is true that immediately after the war there will be a period of prosperity due to the resumption of production of those articles which are not being produced now because of our having converted our manufacturing over to the war effort, such as automobiles, household equipment, building materials and the like.

But inevitably, there will be a lag, probably followed by a depression, and it is hoped that aviation will be the comparatively new industry that will lead the way back to prosperity.

These same economists have also said that aviation was not ready to accomplish this for us back in the early 30's, because of the risks inherent in the business.

But that is no longer true, because airplanes are said to be safer than automobiles. There is still the problem, however of taking care of that residue of risk, which, as in the case of automobiles, always remains over after all advances in engineering and safety enforcement have been made use of.

It is at this point that insurance must be in a position to step in and assume the residual risk, so that the aviation industry will in no way be retarded.

If what I have just said is a correct statement of the situation, and if it correctly indicates some of the obligations which insurance has both to the aviation industry and to the flying public, then it seems to me that a very close cooperation will have to exist between insurance and aviation.

STANDARD RATES

Besides the need for a standard policy, it has also been suggested that there also should be a standardization of rates, so that like risks and like units of exposure will be charged a standard rate when operating within the same territories and under similar circumstances.

One of the advantages claimed for the standardization of policy forms, ties in closely with this matter of standardization of rates. It is that unless policy forms are standardized, it would be possible for coverage concessions to be made to some air lines, or private operators, which in effect would amount to rate concessions.

BROKERAGE AFFILIATIONS

Reference has been made in some of the studies of this problem to the matter of brokerage affiliations and brokerage commissions.

Some of the students of the problems have said that brokerage affiliations are necessary. Because of the highly technical features of aviation, brokers generally are unable to perform their usual valuable services, which they customarily perform in connection with other lines.

They also say that the cost of coverage has necessarily been increased because of the commissions paid to brokers.

They have also said that because of having to go through brokers the companies have not been able to get as close to their insurer as they would have liked.

They would like to be able at all times to see the inside workings of their insurance carriers, so that they will be assured of standardization of coverage and rates; and also so they can anticipate their new insurance problems before they arise, and get together with their insurance carriers in order to provide for a solution.

I am not speaking for or against these contentions concerning brokers, I am simply stating that some of those who have given considerable thought to the problem have raised these points.

DOMESTIC COMPANIES MORE DESIRABLE THAN FOREIGN

One feature which seems to be growing in importance is the matter of placing the coverage in domestic companies, and not in foreign companies.

The importance of this is said to be because of the unwillingness of the air lines to permit their foreign competitors to become too well acquainted with American aviation, because of the competitive advantage it would give the foreign operators.

There is also the matter of government funds received by the airlines in payment for carrying the mail, finding their way into foreign hands.

These are only a few of the problems that I have time to mention in these few minutes, that have come up in connection with aviation insurance.

* * *

CHAIRMAN GAMBRELL: Now, having sort of broken the ice with these original remarks, I think we would do well to invite any and all of you to answer any statements that you would like to challenge, and to ask of these speakers any questions which you would like to submit to them. You can address the question to the meeting, as a whole, or you can address it to one of the speakers, if you have in mind a particular one who ought to answer your question; so we will be very happy if you will let us hear from you.

MR. KELLY: Just to get the discussion rolling, I would like to suggest that through the remainder of it we try to make a distinction between what seemed to me two very dissimilar functions which the insurance business has in the field of aviation. There has been some discussion, of course, of the place of insurance in support of, you almost might call it, the common carrier, the air transport company, whose primary business is the transportation of passengers and express or freight, and we also have the very dissimilar problem of the place of the insurance business in insuring the private passenger plane. We have drawn many analogies in the insurance business from the standpoint as between the development of automobile insurance and the development of aviation insurance. Yet, it seems to me, in the field of the air transport insurance, air transport line, we have a completely dissimilar situation. We are very much more in the realm of railroad law than we are of automobile law, since I would think that the experience we have had in the premiums paid are, to a substantial degree, paid for passenger liability and, of course, the problems which arise in connection with the claim of the passenger against the air transport company are probably going to be much more similar to the claim of the passenger in the railroad coach than they are to those of the passenger in the private passenger automobile.

The reason I think the distinction might be valuable in our discussion is that Mr. Reiber's remarks applied almost entirely to one phase of air transport insurance, where the insurance company was providing the coverage for the commercial line, either carrying passengers or freight, while most of Mr. Breen's remarks that came to my ears seemed to apply to, perhaps, the field of the private plane; for example, the rather splendid job which was done in the automobile field through the cooperation of the companies and the American Bar in developing a standard automobile policy was done entirely with the thought that here was a means of transportation in the

hands of members of the public, and that a coverage had to be developed which could be offered to the public by the insurance companies which would provide protection to the owner of the automobile and to the person who might be injured in an accident.

I would think, to throw another thought out for further possible discussion, that these gentlemen have been thinking, and you have been thinking, not in terms of the present but in terms of the future. Those of us who have watched the development of automobile insurance through the years know that, like Topsy, it just "growed." We have been opportunists in the legal field. We have made our compilations of decisions ten or fifteen years after we should have started and, perhaps, this organization through appropriate committees, one in the field of private aviation insurance and the other in the field of air transport insurance, might be able to afford to the lawyer in practice from year to year something like the digests which we are now getting on automobile insurance, which are of tremendous value to every lawyer in private practice.

I am not advocating any position but I thought, since you needed someone to start the discussion, those might be ideas you could work on.

CHAIRMAN GAMBRELL: Thank you, Mr. Kelly. Will someone else offer a suggestion or ask a question? This meeting will be a success to the extent that we hear from you.

MR. FRASER: As I understand it, generally speaking, the law today is that it is required of a passenger or a shipper of freight, either one, to prove negligence before he can recover from an air carrier?

CHAIRMAN GAMBRELL: Generally, speaking, the old-fashioned rules of negligence apply. There are a few states in which special statutory provisions have been enacted.

MR. FRASER: Similar to the railroads?

CHAIRMAN GAMBRELL: Similar to the railroads, dealing with res ipsa loquitur or prima facie presumption and so forth. The Commissioners on Uniform State Laws and, I think, the Committee of the American Bar Association, and others, thought a few years ago they had a law which would serve the purpose, but recently it has been concluded by the American Bar Association Committee and others interested that the best thing to do is to wait a while and learn a little more from experience. So, very little actual legislation has taken place throughout the country and, generally speaking, you might say the rules that apply to an automobile accident apply to an airplane accident.

MR. FRASER: Did I understand from your remarks that your research has led you to believe that field of liability should be national in character and that federal legislation should establish the liability of the air carriers?

CHAIRMAN GAMBRELL: Mr. Godehn made that statement. There is much to be said on both sides. It is, at least, a nice subject for discussion and debate. I stated, from a standpoint of safety regulation and from a standpoint of economic regulation—I did not say tort liability—from the standpoint of how you shall make your landing on an airport, whether you shall fly clockwise or counter-clockwise, and how much visibility there shall be, and so forth, I think there ought to be uniform rules throughout the whole country for that, and I think there ought to be pretty much uniformity in respect to economic regulations, that is, as to franchises. I think the very nature of the industry makes that almost necessary.

Now, as to the question of liability for damage or accidental death and so forth, a great deal has been said in favor of national uniformity there. Mr. Godehn has expressed his personal belief that there should be national uniformity, for many reasons, one of which was that otherwise you have the state of X gouging an airline and the state of Y, next door, getting practically nothing out of it.

MR. FRASER: I was thinking of the fact that a passenger gets on a train in Chicago, bound for California, and if the accident happens in Illinois he is limited to $10,000 but if it happens in Nebraska there is no limit. He can go up to the sky.

CHAIRMAN GAMBRELL: That is right. They travel over so many state lines.

MR. McDONALD: Gentlemen, I'd like briefly to refer to House Regulation 1012, which was reported to you just now as the Lea-Bailey Bill. It is so changed in its present form from what it was when first introduced that I think it would be interesting for us to comment on it. Mr. Gambrell spoke of the economic regulation phases. There is one provision in that original bill prohibiting multiple taxation by political subdivisions. It would have directly taken away from twenty

states certain revenue which they now receive from airlines. I understand that the reason for that original draft was the Northwest Airlines case, where the state of Minnesota, I think, taxed all of the airplanes of the airline, regardless of where they were on the tax date. While this has to do with taxation, I believe it is proper to bring it up here.

CHAIRMAN GAMBRELL: This is insurance here today. We are discussing only the things that are reasonably closely related to insurance. I doubt that this tax item would be within the province of the discussion, although I don't imagine anyone would want to stop you.

MR. McDONALD: As to the taxation phase, as it is now set up, they ought to consult with state authorities and report back to Congress with reference to taxation, and the point I want to make is this: that in the hearings held on the original bill they said that, one of the witnesses testifying said, under the head of safety regulations, "We quite frequently find ourselves being taken in economically." That was the substance of the testimony there. So we have to watch because, after all, these various subdivision units will have to have some provision for the airports and their support and maintenance.

No. 1012, also, as now set up, has a splendid provision in there in reference to insurance, that they shall go with the state agencies, investigate and report back, and bring in their recommendations in that connection. But no one has, to this point, I think, mentioned House Resolution 1992, which is the bill that would set up in the United States Treasury an insurance fund, and in the final analysis this would establish a new bureau. It would put the government in the insurance business in competition, as I see it, with American enterprise, and while they say, "We will be following the marine insurance plan," I can't follow through that the American markets at the present time, or the available markets, would justify going as far as 1992 goes. That bill has been provocative of discussion in the press and the aviation industry and in the insurance publications to such an extent that I think we should be advised of it and consider it, because there are those of us here who have different views in that connection.

I am interested in what the gentleman just asked about the degree of chargeable liability and, as far as I know, the res ipsa loquitur has not been applicable in those cases that I have seen, those cases that I have in mind. The Supreme Court of Tennessee, in the last two weeks, has declined to follow specifically that doctrine, and in answer to the gentleman about the question of information leaving the country, there is a plan, I believe, now, for accident insurance for worldwide travelers in Washington, which you may purchase. It is a worldwide purchase. The countries to which you travel are not made known or passed out until your return adjustment of that fare is made; and by the same token, until such time as this emergency is past, I see no reason why such a plan, with such premium, if it is good for one phase of insurance might not be made applicable to others.

CHAIRMAN GAMBRELL: Thank you. Has anyone anything to say in reply to Mr. McDonald's remarks, or have we some further questions or observations? I knew nothing of the bill that Mr. McDonald referred to before it was introduced, but it was my understanding, in asking someone about it later, that the purpose was merely to provide reinsurance in case it was not otherwise procurable in this country. The thought behind it, someone told me, was merely to supplement reinsurance facilities to the extent that we might at any time deem necessary. I don't know who originated the idea. I don't know who drafted the bill. Are there any other observations or questions at this time? I hope you will feel free to stand right up and get into the discussion, because this subject is of growing importance, and I hope that next year we can have an even better meeting than we have this afternoon.

MR. BREEN: I would like to say, in answer to Ambrose Kelly, that what I had to say I did not apply particularly to private flying. I think it applies equally as well to the airlines. I may have given that impression, but it seems to me it does apply just as much there because, viewed from the social standpoint, the problem of taking care of the injured persons is just as pressing in the case of aviation, whether it be commercial aviation or private flying, as it was in the case of the private owner of the automobile, so that I think it applies equally as well there. The parallel between the common carrier of the airline and the common carrier of the railroad is not exactly perfect, possibly for this difference, that I believe

that some restrictions have been placed upon the matter of self-insurance of airlines and have not been placed upon the self-insurance of railroads. They can be surmounted, it is true, but at the present time they are considered restrictions.

MR. KELLY: Are not those restrictions the result of the position taken by the Civil Aeronautics Board in the fixing of rates?

MR. BREEN: That is right. As I understand it, they cannot charge costs which are purely administrative in character. A $10,000 premium which they would pay to a private insurance company they cannot set up in a fund. They must deduct the cost of safety inspections, and so forth, which would be charged through operations.

MR. KELLY: The Interstate Commerce Commission, with reference to railroads, permits them more latitude. Mr. Reiber would probably know. It is my recollection that there was some conflict between some of the airlines and the Board in the fixing of mail rates because of the claim of airlines that in self-insuring themselves they were entitled to a credit for the amount which they would have had to pay for insurance, while the Civil Aeronautics Board wanted to go back and say, "What has been the experience? How much would you have needed to pay these claims?" Mr. Godehn, that may be in your field. United was not involved in any of those conflicts. Perhaps we are on dangerous ground. Mr. Reiber, would you care to climb into that?

MR. REIBER: There were several cases where the question came up, just as you presented it; namely, the airline claim that they should be allowed the expenses which they would have incurred had they purchased the insurance in the commercial market, and the Board was of the belief that they should charge only the actual expense. That states the facts.

MR. KELLY: Has the Board been entirely consistent? All I know is what I remember from reading the report of the Air Transport Insurance Association, and I gathered from that that the Board had not been entirely consistent. Mr. Godehn is enjoying your discomfiture.

MR. McDONALD: May I say, I am sure Mr. Gambrell and Mr. Godehn will agree that they have not been consistent.

CHAIRMAN GAMBRELL: We'd like to hear from some of the gentlemen in the rear. I see a lot of gentlemen from Hartford. Surely we should have some expression from Hartford.

MR. KELLY: We are interested, most of us, in the insurance aspects of the development of the aviation industry. In the automobile field we have, of course, had a tremendous public problem created by the thousands of people killed and injured in automobile accidents every year and in providing compensation to the victims. We have built up a tremendous insurance structure which handles literally hundreds of thousands of dollars in premiums and pays out equivalent amounts in losses every year. Is not the future of aviation insurance tied up more with the development of private flying than it is with the development of the air transport industry, as a transportation industry? If the air transport industry has the expansion which some of its more optimistic proponents hope, the insurance premiums will still probably be in comparatively low amounts. The social problem will still be fairly small, because we must assume that these commercial airlines, with the benefit of excellent engineering and safety talent, will keep down the number of people injured and the damages and, therefore, the risk to be insured, the risk remaining to be insured is not as large as if the helicopter and the development of the small plane result in Joe Greaseball, the fellow who used to drive a jalopy Ford, now being able to go out and buy an old trainer from the army and do flying by himself. And, are not the problems of compulsory insurance, which we did not have to face in the automobile business until the problem had fully developed, going to be in our lap almost from the word "Go?"

MR. BREEN: They probably will because all of the proposals which have been made, the Uniform Aviation Liability Act and the Civil Aeronautics Board proposal include compulsory insurance which apply to carrier and private flier. I agree with you that the big problem is going to be in connection with private flying. What I said a moment ago applied to both of them, probably more so to the private flier. I agree that the greater social problem is there, because you always will be able to recover from the bigger airlines. They are substantially solvent, always have been, always will be, and whether they are insured or not makes no diference but, nevertheless, they do take on insurance, and it is desirable they have a standard contract, just as much as it is desirable for the private

flier to have a standard contract. That was my point.

MR. KELLY: The protection of the public is not to the same degree involved because, as you point out, the airline is responsible. If its contract has not resulted in the airline being held for the damage done the person who has been injured as a result of the use of the airline, he will still be compensated.

Mr. Godehn's remarks with reference to the desirability, and I think yours, is one of national legislation, whether we don't have the same possible distinction, that is, national legislation with reference to the air transport business, but leaving in the hands of the states, as it has been, if it seems desirable to do so, the passing of laws with reference to the fixing of liability for the private flier, because many of those private fliers will probably always stay in their own states.

MR. GODEHN: What I had in mind was commercial air transportation only.

CHAIRMAN GAMBRELL: Mr. Brosmith, I am going to have to leave to take a plane. Would you come up and take the Chair? You all know Mr. Brosmith. He presided this morning. I have to catch an airplane. Unfortunately, the only one I can get is one leaving right away. I do hope that we have stirred up a little interest and that we may get together next year and go a little further into this.

MR. REIBER: A suggestion was made a moment ago that bill 1992 would threaten the American initiative and the American insurance market. I think maybe if we define the term American insurance market a little more carefully—as we pointed out, 65 per cent of the premium which had been paid by American fliers and American airlines has been allocated directly to English companies, either directly or through reinsurance. Now, I wonder whether down in Tennessee, if a man is two-thirds negro, I think they might call him a negro, they might even call him a half-breed, but I doubt very much whether they'd call him a white man. I wonder, then, if we should just swallow an American insurance market that calls itself an American insurance market, when it might very well be termed pretty well controlled by foreign insurance interests?

MR. McDONALD: I would like to answer you by saying this—my understanding is that the foreign markets have worldwide purchasers. We will take London—their risk is spread all over the entire world. Now, if you put the Federal Government in this reinsurance business, they will not have that spread. They will not have that opportunity of exposure that these London markets have, and if the Federal Government loses any money it will come out of the taxpayers' pockets.

MR. REIBER: Mr. Chairman, I don't mean to take all the time. In the first place, I don't think the gentleman from Tennessee denied that it was a foreign market, and that is shifting the grounds a little from the question of whether you have an American market or foreign market. Now, if we are ready to admit we ought to have a foreign market, then I am perfectly in favor of approaching that in this way—if we are ready to admit any time a foreigner can do something cheaper we are ready to use the foreigner, then shall we ask the American airlines this: if you can't haul as cheaply as the English, Germans and Japanese we want you to quit, or we want you to use those foreign facilities? If the American people are ready to do that, I think you have somewhat of an analagous problem.

The second thing, if we really like the London boys, why don't they come in and do business? Why don't they come in and compete in the American market? The question of whether they are trying to give the American people as cheap insurance as they can—just yesterday the man in charge of the British Aviation pool in our office in Washington said that the aim of the New York American insurance companies is to make a deal with London. London stays out of this country and America stays out of the rest of the world.

Now, it seems that kind of division, if it is going to be made, is not giving the American airline or the American flier the insurance he'd have if you really gave him competition, and it is not giving the American airline the services that an American company could render him abroad. I think you can have it either way. I mean, if it is really cheaper to go abroad, let's get some competition. Let's let them come in.

MR. McDONALD: It must be cheaper or we wouldn't be going abroad at the present time. I think that is number one.

MR. ROWE: It is not a matter of capacity?

MR. McDONALD: The foreign market has been since the beginning of Lloyds. We have a market that is hardly fifteen years

old. Let American enterprise have the opportunity to meet that market.

MR. KELLY: I don't want to be always in this discussion, but Mr. Rowe has said this is substantially a problem of capacity. In some cases they need a minimum limit of $1,000,000. In some cases the air transport companies have asked for a higher limit. The insurance companies hesitate in the field where the premium volume has been small. The basic idea is to secure a spread through the use of the law of averages. The difficulty has been that there have been only a small number of American companies interested in the aviation market. There are two approaches to the problem, of course, of increasing that capacity. One is through a bill such as the one now in Congress, which sets up a federal fund to provide capacity through federal funds in a federal bureau. The other might be an educational campaign to interest more of the American companies in entering the aviation field. I think there Mr. Reiber will agree that only a small number of the fire and casualty insurance companies, which are organized and operating in the United States, have so far been active in the aviation insurance field. Perhaps there is another approach to this problem between a federal fund and a foreign market, which might be an effort to interest the American insurance companies who now, for one reason or another, don't wish to write actively in the aviation field, in that field, and through the use of the present facilities of American insurance companies to develop an American market which is still a private and not a governmental market.

CHAIRMAN BROSMITH: Does that answer your question?

MR. REIBER: Yes, with these amendments, if I might make them: (a) you say there are a small number of companies but those companies in Best's Guide for 1943—he lists 75 of the largest fire insurance companies in this country—46 of those companies are in the present aviation groups and they wrote 74 per cent of the total premiums in the year 1942. They are the big companies from a stock company approach, and they also have an agreement among themselves that they will not reinsure anyone else who wants to go into aviation business unless everybody agrees. It seems to me, maybe I am wrong about this, that looks a little like trying to freeze the market in favor of the boys that are now in it, and if that looks like it is favoring the development of American initiative I am just strangely misunderstanding the whole thing.

MR. KELLY: A study of the history of American methods would indicate it is a favorite American method.

MR. REIBER: When bill 1992 comes along, the people I talked to in Washington, what they'd like to do, if you give that bill to some bureau, they'd say, "All right, now, stock companies, you have an agreement you are not going to reinsure anyone unless they play ball with you. All right, if you don't reinsure them, we will," and I don't have a question in my mind but what you'd find 400 companies in this country that could slice up that risk enough to take care of it. To give you an idea of how the risks are sliced up, one group in this country takes a risk of $1,000,000 on one aircraft accident doing damage to things on the ground. On a $1,-000,000 risk for one aircraft company, how much is retained in this country? About $75,000; $925,000 is reinsured abroad. Now, personally, I have more confidence in the American insurance company than that would indicate that the other insurance companies have. I suspect if a little pressure were put on you could round up enough good small companies in Kansas City who write in and ask us about getting into aviation insurance business—suppose they'd take only a small fraction of the risk, there are as many companies in this country as there are underwriters at Lloyds, and if they each took a small proportion, or a large proportion, like they do at Lloyds, I wouldn't be surprised but what a large amount of that risk could be absorbed here.

MR. ROWE: That $75,000, it is the first $75,000 that stays here?

MR. REIBER: That is right. That is where your heavy risk is, naturally, but when you go peddling your topheavy risks, suppose you started peddling your topheavy $500,000, they aren't going to take the sour and let you keep the sweet. They will say, "We will take that $500,000 only if you give us a break," so you have got to be in a position where you can say, "All right, I don't have to give you that $500,000."

MR. BREEN: I read in an article in the newspaper last night that the Lea-Bailey bill was killed. I don't know how accurate it is. It was being sent back completely revised and has little chance of passing at this session, and the provisions which were to be revised

were those pertaining to reinsurance, federal participation in reinsurance. How accurate that is, I don't know. It apeared in last night's press.

MR. McDONALD: 1992?

MR. BREEN: 1992.

MR. McDONALD: That is the Lea bill, too.

MR. HODGES: Is not the solution of some of the questions confronting the insurance market largely in the Department of Justice on violation of the anti-trust act? It seems to me you wouldn't need the bill, and if they are doing it that way the market would still be open.

MR. THURMAN: Mr. Chairman, I have doubt as to whether or not the members generally realize fully the importance of insurance in aviation, particularly, and it seems to me that air transportation is an industry in which insurance industry, if we can call it that, is going to be increasingly interested, quicker and to a greater extent than our imagination can really outline. I am halfway betwixt and between. After absorbing some information about insurance for the last twenty-five years, of specializing in that work as a trial lawyer and then having retired from it a year ago last April to go with the air transportation side, I don't know but what I may be in a favorable position to see the thing from both angles.

I want to complain somewhat, if I may, at the insurance executives' attitude toward aviation generally and air transportation. The industry has progressed with such extreme rapidity that I feel they have not kept up with the procession. I am still looking at it from both sides.

Let me give you this example, which I think we can all see more clearly than just to go into statistics and figures and that sort of thing, because maybe some of the rest of you are like I am, when you get up into figures more than about a thousand I don't have any conception of what they mean.

Going back to a ten year period, when there was normal development in commercial air transportation, I say normal, I mean uninfluenced by anything outside as the war situation has influenced it—the development in safety measures was so great during the period from 1930 to 1940, that when we say that in 1930 the commercial company, the scheduled airline of this country traveled the equivalent of 300 times around the world for each fatal accident, but in 1940 the increase in safety measures had been so great that they traveled the equivalent of 1600 times around the world for each fatal accident.

When I went to Dallas last year to assume my new duties, I found out that the thinking in the insurance offices had not kept step, and in checking over our group accident and life policies for our employees I found there is a provision in there, under exclusions, that the coverage was not applicable to an employee who was traveling or, we will put it this way, except who was traveling on a regular scheduled flight as a paid passenger. Well, they never traveled as paid pasensgers. They always traveled on passes or free transportation, but the hazard is no greater for that employee that is traveling on that plan than it is for you, as a passenger, who pay your fare. It took me four months to get that provision changed in our policies. I am just referring now to one example where the thinkings in the home offices of the company are not keeping up with the procession. That is my complaint against the insurance companies.

Now, the value of this business to the insurance companies—I am going to get a little personal because everybody has made my connection with the airlines personal since I got in here by the announcement in the opening meeting that priorities put me off of a plane—we obey the orders of Washington the same as anybody else. Our company is a small company. On the basis of route miles, or on the basis of passenger miles flown, we range either sixth or seventh in the industry, and in normal times, when we had our regular complement of planes on the line—sixteen instead of the seven that the government didn't take away from us—our insurance premiums ranged between $235,000 and $250,000 annually. I just threw that out to give you some idea of the interest that insurance-minded people should have in aviation. What is it going to be when we get more planes, that is just beyond the imagination of anybody.

Now, I am driving at the thought, not only that the insurance companies but the insurance lawyers are going to have to keep up with the procession, because it is going to move with greater rapidity, and nobody can tell what the limit is going to be.

Then I interject into this discussion not only the question of the air transport planes or the commercial airplanes that have been referred to, or the private fliers, but also what

is going to happen with reference to contract fliers and what is going to happen with reference to feeder lines which can be differentiated from what we recognize now as the commercial air transport lines. They are going to clover-leaf this country, and we might just as well look forward to it and prepare for it, because it is going to come so fast that we will not be prepared for it as it comes. We are still going to be behind the procession.

There is just one other thought that has been touched on slightly, and that is the thought which was expressed in the original Lea-Bailey Bill. I am referring to 1012, the House Bill.

Looking at it from the standpoint of one air company — I don't want to charge anybody else with this — if we don't have exclusive federal regulation of all safety and economic boundaries, the normal development of air transportation will be retarded more than anything else that could happen, and I think that we are all interested in it as a matter of public concern, that air transportation, the same as any other industry that contributes to the welfare of the country and its people should develop as rapidly as it can develop, safely and economically, and I say that because it is different from any other industry that we have ever had.

Take our small line now, to get back to something personal—you will excuse me if I use it as an example—we start from Chicago and the first jump, we jump over the state line and we go across the corner of Iowa without stopping and land in Kansas City, Mo. Then we jump from Kansas City, Mo., to Wichita, Kan. Then we jump from Wichita, Kan., to Oklahoma City. Then we go into Texas. We are not something that can be regulated by each state through which we operate and have an operation that is satisfactory, that is good and the thing that the people are entitled to, if in Illinois we have to conform to one set of regulations and, without knowing when we cross a line—we may be up in the air with clouds under us and no visible landmarks, and instrument flying is going to progress and develop much more and to a greater extent than we can now see —we have to change some method of some procedure in our operations in order to conform to the laws of Iowa, even though they don't stop there. Then when we cross the other line we don't know, we can't see from the air, but we have to conform to a regulation in Missouri. Then Kansas, then Oklahoma, then Texas—every time we cross a state line. Now, that is an exaggeration, but you can see that if each state is going to regulate we are practically lost and we will be retarded because then that will result in litigation because we contend—may I say? I contend—that any local air navigation is liable to so interfere with interstate commerce that we feel the United States Supreme Court will uphold the right of the federal agency to regulate private fliers, commercial fliers, pick-up fliers or anybody else using any airport or any airway, which has been designated as a federal airway, but we will have to wait for the decision of the United States Supreme Court before we will know what we can do. That is the thing that is on my heart, the thing that I have been working with.

One more thought that I will express—I have talked too long—arises from the fact that I was on the Committee of the Air Transport Association, making suggestions as to liability features of the Lea-Bailey Bill, and my own conviction is after looking at it from the trial lawyer's standpoint and from the aviation standpoint, that we can, we will, support a provision in the Lea-Bailey Bill providing for and creating absolute liability on the air carrier for death while in flight and absolute liability for any injury, death or damage to any person or property on the ground over which we are flying, if we can have a fair limitation upon death claims and injury claims, that is, at least to make them not in excess of the amount of the limitation on death claims because, again, this means of transportation is so different from rail transportation or motor transportation that a person who is injured, or the dependents of one who may be killed, has not the means of getting the practical information that is involved in an airplane accident. That is primarily why I say that.

On the other hand, the air carrier should not be subjected to an unlimited liability in a spot over here if an accident occurs, and then a limited liability in a spot two or three miles distant over here if an accident happens there. That is illogical and can't be justified.

CHAIRMAN BROSMITH: That was very generous of you, Mr. Thurman, to give us the benefit of your thoughts, and I notice a number of home office men here. It may be possible they will take back to the home offices your ideas.

MR. THURMAN: That is the reason I said it.

CHAIRMAN BROSMITH: Does anybody else wish to be heard? Does anybody want to respond to Mr. Thurman or add to his ideas? Mr. Rowe, how do you feel about it?

MR. ROWE: I don't know enough about it to respond to anybody.

CHAIRMAN BROSMITH: You ought to be able to speak very eloquently.

MR. ROWE: I am wondering, when Hal touches upon liability and limitation features, he is more or less getting into the compensation field, setting up certain stipulated payments in funds. I think there is a reason for the distinction between compensation law and the airplane business. I don't know how he would handle that.

MR. THURMAN: All I meant was limitations such as the states now have, many of them, I think all but about fifteen or seventeen, something like that, limitations upon the amount collectible for wrongful death and that, with the benefits accruing from the fixing of absolute liability without proof of negligence, it will be beneficial in the long run to have such a limitation upon the amount of a death claim, and then limit an injury claim to at least the extent of the death claim.

CHAIRMAN BROSMITH: Anybody else?

MR. LLOYD: I don't know whether this question should be addressed to Mr. Godehn or to Mr. Thurman, but is there any doubt in your minds but that the Interstate Commerce Commission is going to take over the control of airplanes, I mean, the commercial lines, in the future?

MR. GODEHN: You mean by that, they are going to be removed from the Civil Aeronautics Board and transferred to the Interstate Commerce Commission?

MR. LLOYD: Yes, and put right in under the Interstate Commerce Commission, the same as most other forms of transportation.

MR. GODEHN: I doubt if anyone can answer that.

MR. LLOYD: Another thing, after the last war there were thousands of pilots. In this war there are tens of thousands of pilots being trained, but most of them are young. Some are going to enter the commercial fields. The others are going to drop out, just as they did in the last war, mostly. Everybody wanted to fly after the last war, but I don't think most did. Don't you think that is going to be the experience now? They can't afford to fly when they get out and by the time they are able to afford to some of them will have lost all of their incentive.

MR. GODEHN: I think that is true, but I think it is somewhat different from the last war in that the price of an airplane will probably not be prohibitive. It will be a great deal lower than it was.

MR. LLOYD: Don't we have a little different class of boys training in this who are not able to afford it as much as those who could have in the last war?

MR. GODEHN: That is true.

MR. PETERSON: I am afraid I will just have to disagree completely with the last gentleman's remarks and I just want to speak entirely out of my own personal experience, not from a business or legal standpoint. It has been my lot to come into close personal contact with a great many of the young men who are going through the war training service, formerly known as the Civilian Pilot Service. Those are the typical men who are being trained to fly now, and I have yet to find any of them who don't intend firmly to fly after the war and, furthermore, who have not every reasonable prospect of flying after the war. I think perhaps some of us are a little too prone to look back to the experience after the last war, when men came back and those who could bought one of the old Jennys and bound it up as best they could with some hay wire and flew as best they could. Today it is a little different. Today it doesn't cost as much. You can buy a used plane now which was made by individual processes and not mass production for less than $1,000. You can fly it cheaper than you can drive an ordinary passenger automobile. A friend of mine recently took a trip of 2,200 miles in his own private plane and found it far less expensive than it had been in his automobile. These facts are going to make it possible for not only tens of thousands but hundreds of thousands of people to fly very, very soon after this war. The helicopter, I think, has been going on much faster than we realize. I think our eyes are opened a little bit by some of the recent petitions for bus service franchises and cargo carrying and pick-up of mail by the helicopter. I want to register my voice in complete disagreement with the statement made that those who will come back will lose interest in flying and be unable to do it. I am afraid just the opposite is coming true, and I think

if we fail, as insurance men, as insurance attorneys, to see the possibilities that lie ahead within the very, very few years immediately to come, we are just going to lose out on this thing, and I don't know whether it will shift into governmental insurance as the second bill seemed to indicate. I don't know whether we are going to lose out on that score or just how it is going to come out. I think we are going to have to be alert to the possibilities there.

MR. LLOYD: I just spoke from my experience of the last war. I was a pilot and thought that I was going to fly the rest of my life and I have never flown since, except commercially.

MR. PETERSON: I was just speaking from my own experience. I am a pilot. I recently bought a plane and find it cheaper than an automobile, and I am going to keep right on flying.

CHAIRMAN BROSMITH: Mr. Peterson, if I could interject a remark myself, as Chairman, if your prediction comes true I am going to spend my week ends in the cellar because I don't want 100,000 airplanes over my head every week-end.

MR. PETERSON: I think that is a very good point. We are going to have to watch, as insurance men, the tremendous possibilities in air traffic. The adaptation of the helicopter is going to be a result of that. The helicopter can stop right now in its own length at thirty miles an hour, which is a better safety factor than the automobile. It can go up and down and underneath other traffic instead of being restricted to the narrow confines of the road.

CHAIRMAN BROSMITH: Unfortunately, some automobiles stop in their own length, sir, going thirty miles an hour. You see, I am insurance-minded and a very poor Chairman. I should keep still.

MR. COLE: Following the gentleman's comments, as well as Mr. Kelly's original statement, I think you have possibly three propositions we have to face, and that the private flier is totally dissimilar to the airlines. You have the airlines on which we are going to have to have certain definite rules, probably much more arbitrary and mandatory than the others. You also have the category of the commercial pilot. He may make a hop of 50 to 100 miles. They will not be flying in the weather that the airline pilot flies. He is making his living that way. There is a possibility, of course, it will not be like the airlines. I think that is a second category in which there is going to have to be a different type of limitation and different type of liability.

I speak also on this point as a private flier. The boys who are now carrying on the ferry transport are private fliers who spent their $6, $7, $8 or $10 an hour to learn to fly, and they are rendering an invaluable service to the country. I don't believe the private flier in the past has been fully appreciated, and although I feel that there should be some liability that a private flier must face, I think that we will be very wise, from the standpoint of the industry alone, if we see to it that that private flier can take his lessons, can own and fly a plane without the possibility of an unlimited law suit against him. I think it should be small. If I take up a friend or guest of mine, I am taking him up as a private flier, not a commercial, and if I have an accident, it might by my fault and it might not, if I own my plane, as I do, also —I pay $20 a month hangar charge and I keep up that plane, and I pay for my own lessons, I feel that I should be protected to the extent that if I do have an accident my liability is limited, and still that the passenger should have some responsibility in establishing a claim. I feel, as Mr. Kelly originally said, the situation is dissimilar entirely. You don't have much chance in proving it as against a private pilot, but we should realize these young boys who come back aren't going to have much money, and although planes are cheap and will be cheap then, cheaper than ever before, it is an economic standpoint as to the fliers and also to the aviation industry itself, and if we intend to have this industry pick us up and carry us along they must have a market to sell, and the boys who participate must have some protection.

MR. ZURETT: I don't think it is a question so much of whether they are going to want to fly when the war is over. I think they will. My experience in talking to the boys is the same as Mr. Peterson's. However, the aviation industry is highly geared. They will proabbly continue after the war, and if they continue it is going to be in the manufacture of private passenger planes, largely. Now, if they decide that the boys who want to fly, and the general public is going to fly, they are going to fly, because they are going to popularize it, progagandize the public and people are going to fly.

The question is not only whether you can buy a plane for $1,000. The question is also after you pay the $1,000 how much more will you have to pay before you can fly? How much is the insurance going to cost the fellow after he has paid the $1,000 for the plane? Is he going to find, if he has paid this money, it is going to take another $250 or $300 for insurance so he can get it up into the air? If that is the fact, and it seems it might be, I should think that would be a very great deterrent and if it is a deterrent, what is the airplane manufacturer going to do about it? I hardly think that the airplane industry, large as it is, and it is going to be, is going to take that sort of situation sitting down. If they find that they can't sell their planes because it costs too much to insure them, they are going to do something about it. How are they going to do it? They will either organize their own insurance companies or else they will foster or promote a substantial lobby in Congress for government insurance of private passenger airplanes. The airplane industry is not going to let the airplane business stop or the insurance companies stop the development of private passengers flying in this country. You have got a problem. It is a problem you have got to meet. It is a problem the insurance companies have got to meet, and I think you have got to be very forward-looking.

I believe the airplane industry is going to be the big thing. I think your big automobile companies are going to go in for it, and when they do they will do it on a large scale. It is going to mean something, but the insurance companies have got to keep pace with them. You have got to go a lot faster than you went with the automobile business. I think the companies were a little bit behind. It took a good many years to get a standard policy. It took a good many years to get the rates down where the general public could and would pay them without complaint, and I think there is little doubt that there is a general trend towards socialization of everything and government control of everything. Either we are going to do this job or the government is going to take it over and do it for us. We can't duck it. There is not any use of trying to say that we will do something later on or we will see how it works out. You have got the chance now before the situation arises to start formulating your plans. If you don't do it, it is going to be done for you.

CHAIRMAN BROSMITH: Thank you, sir. Any further discussion?

MR. LUCAS: I am just wondering, is there any particular reason why the law as to aviation will develop much differently than the law has developed with reference to common carriers generally and with reference to private automobiles and private conveyances? Is there any particular reason why it should not develop along the same line? In other words, with reference to common carriers, we will have a presumption either by enactment or by common law construction of it.

CHAIRMAN BROSMITH: Would you care to answer that?

MR. BREEN: There is only one thought I have on that. That is, the difficulty of proof. That is the reason that the law will develop a little differently. That is why such things as the proposal of absolute liability and a counter-proposal of burden of proof—because after an airplane crash much of the evidence has been destroyed and is very difficult to get.

MR. LUCAS: The same applies with reference to a railroad, too.

MR. BREEN: That is true—not quite so much, I don't think.

MR. LUCAS: It depends.

MR. BREEN: To a great extent, but in connection with automobiles—you said railroads and automobiles.

MR. LUCAS: With buses you have the same situation, a head-on collision with a bus.

MR. BREEN: There are times which would. I think, however, that the frequency with which the evidence might be destroyed is probably a little greater in connection with aviation than it is with other kinds of carriers. At least, that is my idea.

CHAIRMAN BROSMITH: Mr. Reiber, would you care to be heard on that?

MR. REIBER: The difficulties of proof are very considerable, not only because even if something remains of the plane too often all the passengers are no longer available, and if they are available they can't tell you what happened. There is no mark left anywhere to show what happened.

MR. LUCAS: I think there would be a greater presumption in favor of a plaintiff in an airplane accident. The burden would be considerably less, whatever the nature of

the form of transportation, with the airplane than there would be as we now have it with public vehicles or otherwise.

MR. REIBER: The difficulty is that common law has not moved rapidly to do that. To apply res ipsa loquitur you should know what the normal operation has been. We don't know enough about it to know what the normal course of a court would be. Therefore, we can't apply automobile and railroad law as we are applying that now because we feel we have arrived at a stage where we know enough about it.

CHAIRMAN BROSMITH: The meeting is still open, gentlemen.

MR. McDONALD: I would like to say—Judge Thurman, I was going to make a statement and I wanted you to follow me, please, sir. I understand when Col. Gorrell was testifying recently before Congress or the Congressional Committee that in response to a question as to whether any state had attempted to set up rules with reference to safety that would be contrary to the federal rules, that is, the rules of safety established by the Civil Aeronautics Board, he did not know of any state that had attempted to establish or set forth any rules. I thought that would be of some benefit here, knowing that no state has yet at any time attempted to get into that safety field, insofar as air transport is concerned.

MR. THURMAN: That, I think, is absolutely true. In the legislatures that have been in session this year there have been a number of bills introduced to give a state bureau or commission the power to do it, and that has been the threat that has been the thing which is dangerous. It has been the thing that will retard, in my judgment, the development of aviation because if there is some power or authority in a state to make a regulation to licensed airplanes, to licensed pilots and so forth, then the commission and the administrative body can go ahead and do anything with reference to legislation and so forth, and it is a constant threat to developing industry that will retard it, I think. That is my conclusion.

CHAIRMAN BROSMITH: Is there anything further? Does anybody else wish to be heard or express a thought on the subject?

MR. McDONALD: I hope the group will pardon my getting up again, but when the American Bar Association meets here in August, gentlemen, there will be a similar round table discussion in the insurance section, at which this subject will be taken up. One of our speakers will be Mr. Gambrell and the other gentleman will be the General Counsel of the Civil Aeronautics Administration.

Over-Extension of The Doctrine of Privileged Communications Between Physician and Patient — Counteracting Recommendations

By Kenneth B. Cope
Canton, Ohio

ATTORNEYS in every field of insurance law in which medical proof is material in determining the nature and extent of disability are frequently prevented from presenting the true facts to the court and jury by the intervention of the doctrine of privileged communications. Conceded and recognized to be unfair, justified by rationalizations which have no basis in fact, but spreading apparently in some quarters, the privilege between physician and patient remains as a bulwark for the malingerer and a protection to him against the full truth.

We are all too prone to accept the continued existence of the privilege without doing anything to exterminate its life. In almost every other phase of legislation if a policy of the law has proven itself to be unjust, the offending law has been repealed and the policy has been discontinued. Not so with the privilege granted to the relationship between physician and patient—this has withstood all assauults made upon it notwithstanding the acknowledged wrongs which have been perpetrated in its name. The courts are thoroughly conscious of the inequity created by this type of statute. How many times have we seen in the reports the apologetical observation of a judge, conscious of a failure of justice when he states in his opinion: "Although for the purpose of construction we have referred to the underlying

reasons for the statute, we are not here concerned with the wisdom of its enactment. That is for the legislature." (Harpman v. Devine Recr. 133 O. S. 1, 10 N. E. (2) 776).

With these thoughts in mind, it might be well to pause momentarily to consider the historical background and circumstances responsible for the birth of the doctrine of privilege.

There is a natural repugnance against the violation of a confidence; on this we believe all men would agree. This feeling, however, is not confined exclusively to professional confidence nor to confidence between physician and patient. At one period in the early common law there appeared to be some question as to whether courts would force a witness to disclose that which was revealed to him in confidence but this of course has long since been determined against respecting such a trust in a court of law. Nathan B. in Hill's Trial 20 How. St. 1362 (1777) in commenting on the violation of a confidence by a friend of the defendant stated: "Gentlemen, one has only to say further, that if this point of honor was to be so sacred as that a man who comes by knowledge of this sort from an offender was not at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honor. If the man is a legal witness, you are bound to receive his testimony, giving it, however, that weight only which you think it deserves." Thus it was determined at an early date that confidence and trust could be no bar to the search for truth in the trial of a lawsuit.

Logic, common sense and sound judgment all point to the conclusion that per se there is no justification for the existence of the privilege between physician and patient. Such was the established common law. In a bigamy trial a physician who had attended the accused was interrogated of the marriage of the accused. Duchess of Kingston's Trial 20 How. St. Tr. 573. The physician protested that any knowledge he had on the matter came to him in his capacity as a physician. Of this Mansfield L. C. J. stated: "If all your lordships will acquiesce, Mr. Hawkins will understand that it is your judgment and opinion that a surgeon has no privilege where it is a material question in a civil or criminal cause to know whether parties were married or whether a child was born, to say that this introduction to the parties was in the course of his profession and in that way he came to the knowledge of it. . . If a surgeon was to voluntarily reveal these secrets, to be sure he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

Such was the common law concerning privilege between physician and patient. In 1824, however, the State of New York enacted legislation granting a privilege to physician and patient and thus the difficulty was started. Other states followed the example set by New York until today about one-half of the states have created the privilege. Why did this legislation suddenly appear when the background of the common law for centuries was against such enactments? In 1836 the Commissioners on Revision of the statutes of New York III P. 737 stated:

"The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance."

In Edington vs. Insurance Company 67 N. Y. 185, 194 Miller J. cited further justification for the statute as follows:

> "It is a just and useful enactment introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sickbed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship."

It is interesting to note that one of the arguments advanced by the Commissioners in the foregoing quoted excerpt is that in the clash between professional honor of a physician and "the temptation to the perversion or concealment of truth" the latter would mostly likely triumph. This is hardly very complimentary to the medical profession as a whole and as is true of most of the other justifications for the privilege we are glad to say has no foundation in fact.

Although the views of the late Professor Wigmore, militant and forceful leader of the opposition to the existence of the privilege between physician and patient, are well known, we believe that it would be wise to stop and re-examine some of his objections to the privilege and the foundation for his views. In his work on Evidence (3rd Edition) Vol. VIII P. 531 in speaking generally of the conditions which should be necessary and present before any privilege is established, Professor Wigmore gives the following.

"1. The communications must originate in a *confidence* that they will not be disclosed.

"2. This element of confidentiality *must be essential* to the full and satisfactory maintenance of the relation between the parties.

"3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and

"4. The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigations."

It would seem from the standpoint of logic, justice and morality, the ingredients for establishing any rule or policy of the law, that the requirements laid down by Professor Wigmore are unassailable and can not be questioned. At pages 811, 812, et seq. of his work mentioned supra, Professor Wigmore takes the tests as given above and applies them to the privilege as related to physician and patient. Here is the result:

"1. In only a few instances, out of the thousands daily occurring, is the fact communicated to a physician confidential in any real sense. Barring the facts of venereal disease and criminal abortion, there is hardly a fact in the categories of pathology in which the patient himself attempts to preserve any real secrecy. Most of one's ailments are immediately disclosed and discussed; the few that are not openly visible are at least explained to intimates. No statistical reckoning is needed to prove this; these facts are well enough known.

"2. Even where the disclosuure to the physician is actually confidential, it would none the less be made though no privilege existed. People would not be deterred from seeking medical help because of the possibility of disclosure in court. If they would, how did they fare in the generations before the privilege came? Is it noted in medical chronicles that, after the privilege was established in New York, the floodgates of patronage were let open upon the medical profession, and long-concealed ailments were then for the first time brought forth to receive the blessings of cure? And how is it today in those jurisdictions where no privilege exists—does the medical profession in one-half of the Union enjoy, in a marked way, an afflux of confidence contrasting with the scanty revelations vouchsafed in that other half where no privilege protects? If no difference appears, then this reason for the privilege is weakened; for it is undoubted that the rule of privilege is intended (ante, Para. 2285), not to subserve the party's wish for secrecy as an end in itself, but merely to provide secrecy as a means of preserving the relation in question, whenever without the guarantee of secrecy the party would probably abstain from fulfilling the requirements of the relation.

"3. That the relation of physician and patient should be fostered no one will deny.

"4. But that the injury to that relation is greater than the injury to justice—the final canon to be satisfied—must emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation today are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from ague to tetanus the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by everyone—except the appointed investiga-

tors of truth. The extreme of farcicality is often reached in litigation over personal injuries—in the common case, a person injured by a streetcar amid a throng of sympathizing onlookers. Here the element of absurdity will sometimes be double; in the first place, there is nothing in the world, by the nature of the injury, for the physician to disclose, which any person would ordinarily care to keep private from his neighbors; and, in the second place, the fact which would be most strenuously secreted and effectively protected, when the defendant called the plaintiff's physician and sought its disclosure, would be the fact that the plaintiff was not injured at all!"

After demonstrating the lack of foundation for the privilege between physician and patient Professor Wigmore realistically faces and answers the practical argument that since the lawyers have the privilege the doctors should likewise have the privilege. Page 813 of his work states:

"There is but one form in which the argument for the privilege can be put with any semblance of plausibility, and in that form it commonly presents itself to the view of medical men justly jealous for the honor of their profession. This argument is that, since the secrets of the legal profession are allowed to be inviolable, the secrets of the medical profession have at least an equal title to consideration. This, to be sure, is no more than analogy; and nothing is more fallible than an argument from analogy. But, leaving aside the consideration that the privilege for communications to attorneys stands itself on none too firm a foundation (ante Para. 2291), and leaving aside the primary tests (just examined) by which every privilege must be judged, and answering the argument as it is put—the answer is that the services of an attorney are sought primarily for aid in litigation, actual or expected, while those of the physician are sought for physical cure; that hence the rendering of that legal advice would result directly and surely in the disclosure of the client's admissions, if the attorney's privilege did not exist, while the physician's curative aid can be and commonly is rendered irrespective of making disclosure; and, finally, that thus the absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent, while the physician, being called upon only rarely to make disclosures, is not consciously affected in his relation with the patient. The function of the two professions being entirely distinct, the moral effect upon them of the absence of the privilege is different.

The real support for the privilege seems to be mainly the weight of professional medical opinion, pressing upon the legislature; and that opinion is founded on a natural repugnance to becoming the means of disclosure of a personal confidence. But the medical profession should reflect that the principal issues in which Justice asks for such disclosure are those—personal injury and life and accident insurance—which the patient himself has voluntarily brought into court. Hence the physician has no reason to reproach himself with the consequences which Justice requires."

Privilege may be waived in a variety of ways. It would be natural to assume that the tendency of the courts would be to strictly construe the statute granting the privilege because it is in derogation of the common law. It would be natural to assume further in view of the injustices which must arise from the application of the statute, that the courts would interpret the statutory provisions with respect to waiver of the privilege most liberally so as to limit the scope of the privilege.

We shall confine our discussion to cases involving waiver of the privilege as a result of the party testifying concerning his physical condition in the course of the trial. The basic question is governed by statute which varies with the state and we make no effort here to comprehensively review the statutes or cases of every jurisdiction. Of course it must be bourne in mind that some statutes are much more strict than others in providing for waiver and although efforts have been made to generalize on this particular subject, we do not believe that this can be accurately done because of the variety of statutory provisions. We should simply like to examine a few of the decisions with the thought of considering what inroads have been made by the courts as related to this one method of obliterating the privilege between physician and patient.

We shall consider first the waiver of the privilege by the party on direct examination. In Indiana the statute made physicians incompetent to testify "as to matters communi-

cated to them as such by patients in the course of their professional business"—497, subd 4 Rev. St. Ind. 1881. In Williams v. Johnson 112 Ind. 273, 13 N. E. 872 the plaintiff testified that she had been injured, that the doctor had prescribed treatment for her side and back. She refused to testify further. The court refused to permit the physician who treated the plaintiff to testify that his examination revealed no injury. In a more recent Indiana case Schlarb v. Henderson (1936) 211 Ind. 1 4 N.E. (2) 205, the plaintiff was injured in an automobile accident and claimed that as a result thereof she had to undergo three operations involving among other things the removal of the appendix. Two physicians handled the plaintiff's operations and a third made a microscopic examination of the removed appendix. The two physicians testified that the operation for the removal of the appendix was necessitated by reason of the injuries sustained by the plaintiff in the accident. The defendant called the third physician and it was held by the Supreme Court that he should have been permitted to testify, based on his examination of the appendix that the latter was chronically infected and that the operation was not the result of the accident.

In Arizona, paragraph 1677 Revised Statute of Arizona, Civil Code 1913 provided that "if a person offer himself as a witness and voluntarily testified with reference to such communications, that is deemed to be a consent to the examination of such physician or attorney." In Phelps Dodge Corporation v. Guerrero 273 F. 415, a case involving the construction of the Arizona statute, the plaintiff who was suing for an injury to his eyes testified that he went to a doctor who put some drops in his eyes. The court held that this testimony could not constitute a waiver of the privilege because the plaintiff has not testified about any communication to the doctor.

The Iowa Statute, Code 1939 Para. 11263, provides with respect to waiver "such prohibition (against testifying) shall not apply to cases where the party in whose favor the same is made waives the right conferred." In Pearson v. Butts (1937) 224 Iowa 376, 276 N.W. 65 it was contended that in view of the fact that the plaintiff had testified about her injuries and had called a doctor to support her claims, testimony of another physician consulted by the plaintiff was competent on the basis of waiver. This contention was rejected by the court. In Reed v. Fuel Oil Co. 160 Iowa 510, 141 N.W. 1056 the plaintiff testified that he had complained to a certain doctor about an injury to his back and spine, etc. The defendant called this doctor and the court held that he should have been permitted to testify that the plaintiff had not complained to him of any injury to his back and spine.

In Hinscott v. Hughbanks 140 Kansas 353, 37 Pac. (2) 26 the action was one for malpractice. The plaintiff's wife had been confined for a period of time in a state hospital for the insane and during the time she was in this hospital a physician called by the defense had occasion to observe her condition. The plaintiff testified in detail as to his wife's condition. The statute in question, Rev. St. 60-2805, prohibited a physician from testifying "without the consent of the patient." The court conceded that the plaintiff had gone into detail about his wife's condition but held that since nothing appeared in the record concerning the plaintiff's wife's commitment to the State Hospital except in a hypothetical question, the evidence of the doctor who observed her condition there was incompetent. This seems to be a strange result because in the case of Armstrong vs. Topeka Railway Co., 93 Kansas 493, 144 P. 847 the plaintiff had testified in detail about his ailments and the court held that this constituted a waiver of the privilege. The only distinction sought to be made by the court in the Hinscott case, supra, was that the plaintiff's commitment to the State Hospital was not mentioned by the plaintiff except in a hypothetical question. This certainly does not appear to be a very sound reason or basis for distinction.

In Montana Section 3163 of the Code of Civil Procedure (Rev. Code 1935) provided that a licensed physician or surgeon could not, without the consent of the patient testify as to any information acquired in attending the patient which was necessary for the physician or surgeon to enable him to prescribe or act for the patient. In May v. Northern Pacific Railway Company 32 Montana 522, 81 Pac. 328, it appears that the plaintiff received treatment by three doctors and upon direct examination detailed her injuries and treatment by two of the three doctors. The plaintiff did not mention the third doctor except on cross-examination and the court held that the direct examination did not go far enough so as to waive the privilege.

In Wells v. City of Jefferson 345 Mo. 329, 102 S.W. 2nd 1006 the court observed at P. 1010, "The privilege given by Sect. 1731 R.S. 129, Mo. St. Ann. Sect. 1731 P. 4011, is personal to the patient (not a privilege of the doctor) and is waived by voluntarily calling the doctor to testify in plaintiff's behalf about his condition, his treatment and what his doctors advised about it; and calling one doctor waives it at least to all others who treated a plaintiff, in a personal injury suit, after the time of his injury."

In Oklahoma, subdivision 6 of Section 272 O.S. 1931 grants a privilege and then reads: "Provided, that if a person offer himself as a witness, that is deemed a consent to the examination." In the case of Lazzell v. Harvey 174 Okla. 86, 49 Pac. (2) 519 the plaintiff testified that he was in good health prior to the accident in which he received an injury and further testified as to the nature and extent of his injuries. He described his treatment at a hospital and an operation to his throat. The court permitted two physicians and a nurse who had treated the plaintiff for his throat to state their opinion for the defense that the plaintiff's injuries did not result from the accident. It was held that the plaintiff had waived the privilege by his testimony.

In Ohio, Sect. 11494 G.C. provides as follows: "The following persons shall not testify in certain respects: * * A physician, concerning a communication made to him by his patient in that relation or his advice to his patient, but the * * physician may testify by express consent of the * * patient; and if the * * patient voluntarily testifys, the * * physician may be compelled to testify on the same subject." In the case of Harpman v. Devine Recr., 133 O.S. 1, 10 N.E. (2) 776 the plaintiff testified on direct examination that prior to the accident in which he claimed to have sustained injuries he had enjoyed good health. It was developed on cross-examination that contrary to this statement, the plaintiff had consulted a physician. The testimony of this physician was offered by the defense. The physician would have testified that prior to the accident, the plaintiff had been treated by him for pernicious anemia. The Supreme Court refused to admit this evidence on the theory that the word "subject" in the statute refers to "communication" and "advice." Since the plaintiff had not testified either as to any "communication" or "advice" but only as to his good health, there was no waiver of the privilege. No such limitation is contained in the statute itself and the words "same subject" can only mean *any subject* on which the party testifies with reference to his physical condition. The decision of the Court was contrary to precedent in Ohio (King v. Barrett 11 O.S. 261, Sptizer v. Stillings, Exr. 109 O.S. 297, 142 N.E. 362), was judicial legislation, was not founded on sound grammatical construction and was illogical to the extreme. Although the court recognized, impliedly at least, the dubious wisdom of the statute, supra, nevertheless it extends beyond the expressed legislative intent, the paralyzing effect of the privilege on the search for truth.

Baker v. Industrial Commission 135 O.S. 491, 21 N.E. (2) 593 (1939) is a further illustration of the trend in this state. The plaintiff in this case was suing for personal injuries by reason of an accident in which his leg was injured. He testified in direct examination that prior to his injury he had had no sores of any kind on his leg. He further testified that after the injury his leg was swollen, sore, etc. and that he was sent to a skin specialist for treatment, a Dr. Phillips. Dr. Phillips was then called to testify and was asked whether he had received any facts from the plaintiff as to how long the condition of his leg had existed. The physician answered that the plaintiff had stated the condition to have been in existence for a period of six months prior to the time of the doctor's first seeing him, which would have been on a date prior to the accident. The Supreme Court held that while Dr. Phillips could testify as to the condition of the leg because the plaintiff has testified to this—the exhibition of the leg being a "communication" in respect to its condition, still the court refused to permit testimony as to any *oral "communication"* by the plaintiff to the physician. The court in this decision did not even follow its own pronouncements in the unsound decision of Harpman v. Devine Recr. supra, in arriving at this result. Under the narrow interpretations of waiver in the Harpman case it should follow that if the patient testifies to a "communication" to the doctor, then at least on the subject of "communication" the door should be wide open to communications of any nature whether by exhibition of the body or by word of mouth. The court, however, judicially legislates by distinguishing between various kinds of communications; we say this advisedly because at no place in the statute

is any distinction made between oral communications and communication by exhibition of the body. Thus the privilege grows.

Turning now to the waiver of the privilege by reason of information elicited on cross examination, it seems to be well established that irrespective of statutory provisions the privilege is not waived by reason of any admissions secured from a party on cross-examination. It is true in one sense that the very term "waiver" implies voluntary action on the part of the party against whom the waiver is sought to be enforced. It is further true that some of the statutes dealing with waiver of the privilege expressly require that the waiver be "voluntarily given," Ohio supra, for example.

In connection with what seems to be this well established rule, it is interesting to note the decision in the case of *Manzer vs. Swedish American Line,* 35 Fed. Supp. 493 involving the privilege Communications Statute of New York. The New York statute requires that the communication shall be privileged unless "the provisions thereof are expressly waived upon the trial or examination by the * * patient." The statute then provides that waiver must be made in open court except that attorneys in proceedings may stipulate prior to trial on waiver of the privilege. In this particular case the plaintiff claimed to have become insane by reason of certain acts of the defendant. Under the Federal Rules of Civil Procedure interrogatories were served on the plaintiff and in answer to an interrogatory as to whether she had ever suffered from a mental or nervous disability before and if so where and by whom had treatment been given, the plaintiff answered that she had had previous difficulty and gave the place of treatment. The plaintiff also answered interrogatories relative to her treatment for the insanity which she claimed resulted from the acts of the defendant. The defendant issued a subpoena duces tecum to the sanitariums where plaintiff had been treated to require production of the records of the sanitariums; the plaintiff then moved that the subpoena be set aside because the matter sought was privileged. The court pointed out that under the decisions of the New York Courts a waiver could be implied from the conduct of a party. The court then held that the plaintiff had waived the privilege by answering the interrogatories propounded to her by the defendant and permitted the defendant to inspect the records at every place where the plaintiff had received treatment as disclosed in her answers to the interrogatories. The court held that the answers to the interrogatories were voluntary because they had been answered without objection. This decision is certainly a most interesting one and particularly in view of the general rule regarding disclosure of information on cross-examination as not constituting a waiver of the privilege.

As stated above it is rather difficult to draw any general conclusions as to the tendency of the courts in expanding or limiting the doctrine of waiver as related to the testimony of a party so as to increase or cut down the scope of the privilege. In some jurisdictions it would appear that the courts have made liberal strides toward the goal of using this particular means of limiting the effect of the privilege. In other jurisdictions the exact opposite tendency has been noted with the result that the law is in a state of confusion and the chance for expansion of the privilege is greater. In other jurisdictions of course the statutes are such that even if the courts were inclined to be liberal, the legislative body has given them no such opportunity.

In some jurisdictions steps have been taken to remedy the situation created by the existence of the privilege. In California, for example, in C. C. P. 1872 Sec. 1881 Par. 4 it is provided: "* * provided further that where any person brings an action to recover damages for personal injuries such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify * *."

North Carolina has also enacted legislation which is a step in the right direction, Con. St. 1919 Sec. 1798, being as follows: "No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character and which information was necessary to enable him to prescribe for such patient as a physician or to enable him to do any act for him as a surgeon, provided that the presiding judge of a superior court may compel such disclosure if in his opinion the same is necessary to a proper administration of justice."

In 1938 the American Bar Association's Committee on the Improvement of the Law of Evidence made the following recommendation:

"Communications between Physician and Patient. The privilege for communications between physician and patient was not recognized at common law, but now exists by statute in about half the states. It is rarely invoked or applicable except in the following three classes of issues: (1) Mental capacity of a testator; (2) Nature of a personal injury; (3) Nature of an insured person's health. The purpose of the statute was mainly to conform to the physicians ethical canon of secrecy, on the theory that the personal privacy of the patient's body was entitled to be respected. And yet the odd thing about the privilege is that it is usually invoked to protect from disclosure a bodily condition which has not been kept secret at all from friends and neighbors, and which only the tribunal of justice must not learn about. In personal injury claims particularly is the privilege ridiculously incongruous; for the plaintiff comes into court alleging a specific injury and then refuses to let the court listen to testimony concerning that injury. "The amount of truth that has been suppressed by this statutory rule must be extensive. We believe that the time had come to consider the situation. We do not here recommend the abolition of the privilege, but we do make the following recommendation: The North Carolina statute allows a wholesome flexibility. Its concluding paragraph reads: 'Provided that the presiding judge of a superior court may compel such a disclosure if in his opinion the same is necessary to the proper administration of justice.' This statute has needed but rare interpretation. It enables the privilege to be suspended when suppression of a fraud might otherwise be aided.

We recommend the enactment of the North Carolina provision, (Vote of the Committee: in favor, 45; opposed 1. The North Carolina member of the Committee added: "The North Carolina rule works all right").

The American Medical Association recognizes that there are appropriate times when it may be necessary for physicians to disclose communications received in their professional capacity. The principle of medical ethics as adopted by the American Medical Association provides as follows:

"Patience and delicacy should characterize all the acts of a physician. The confidences concerning individual or domestic life entrusted by a patient to a physician and the defects of disposition or flaws of character observed in patients during medical attendance should be held as a trust and should never be revealed except when imperatively required by the laws of the state. There are occasions, however, when a physician must determine whether or not his duty to society requires him to take definite action to protect a healthy individual from becoming infected, because the physician has knowledge, obtained through the confidences entrusted to him as a physician, of a communicable disease to which the healthy individual is about to be exposed. In such a case, the physician should act as he would desire another to act toward one of his own family under like circumstances. Before he determines his course, the physician should know the civil law of his commonwealth concerning privileged communications" (Principles of Medical Ethics, Chapter II, Page 4). This canon of ethics, we believe, has been generally overlooked in the fight maintained to continue the existence of the privilege between physician and patient. It should be observed that the lips of the physician are sealed, *"except when imperatively required by the laws of the state."* It is recognized by the medical profession in their Principles of Medical Ethics that they may be required to disclose information in the course of litigation.

We believe that the North Carolina statute presents an ideal solution to the problems which have arisen by reason of the enactment of legislation on privilege. The North Carolina statute is perfectly consistent with the canon of medical ethics and, therefore, if such legislation were proposed there could be no sound reason why it should incur the opposition of the medical profession. We must realize that if efforts are made to repeal the statutes granting privilege in their entirety, the medical profession will most certainly oppose any such change. On the other hand, the great majority of the medical profession have as much contempt for the cultivation of fraud in the name of privilege as have the great majority of the members of the legal profession. Under the North Carolina Statute the privilege as between physician and patient remains, the lips of the physician are sealed against disclosure of

confidences placed in him by his patient. The only way in which the physician can be compelled to disclose any information is when the disclosure "is necessary to the proper administration of justice." The only group who would suffer from this type of legislation would be the malingerer, the defrauder, and that small group of attorneys and physicians whose livelihood is dependent on this type of human endeavor.

It is suggested that constructive action should be undertaken to correct the unsound restrictions imposed by the continued existence of the privilege between physician and patient in its present form. It is recommended that this subject be referred to a Committee of this Association to meet with a Committee of the American Medical Association for study and appropriate action. Perhaps through cooperation between such Committees a very desirable, much needed and constructive reform can be accomplished.

By-Laws of the International Association of Insurance Counsel

ARTICLE I
Name

This Association shall be known as International Association of Insurance Counsel.

ARTICLE II
Purpose

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

*ARTICLE III
Qualifications for Membership

Any person who is a member of the bar of the court of last resort of a State, Territory or Possession of the United States of America or of the District of Columbia or of a Province of the Dominion of Canada or who is a member of the bar of the court of last resort of the Republic of Cuba or of the Republic of Mexico, and is actively engaged in the practice of law within the territory comprising any of the political units enumerated above in this Article, is of high professional standing and who devotes a substantial portion of his professional work to the representation of Insurance Companies in connection with problems and litigation concerning claims arising under insurance contracts, shall be eligible to membership in this Association, upon nomination in accordance with these by-laws.

*As amended at the 1943 annual meeting.

ARTICLE IV
Nomination and Election of Members

Section 1. Nomination. Nominations for membership shall be made by a member of the Association. Every nomination for membership shall be submitted to the Secretary or to such other person as the Executive Committee may direct, in writing, in such form and shall contain such information as the Executive Committee from time to time by resolution shall require; shall be signed by the nominator or sponsor and by the nominee or applicant; and shall contain a certificate in writing signed by at least two members of the Association (other than the nominator) who are residents within the geographical confines of the same political unit (as designated in Article III herein) as the applicant or nominee (except as hereinafter provided), certifying that the nominee or applicant is possessed of the qualifications for membership prescribed by these by-laws.

If there are not two members of this Association resident within the geographical confines of the political unit (as designated in Article III herein) where the nominee resides, then certification as aforesaid shall be made by the member, if any, residing within the geographic confines of such political unit, and two other members of this Association.

Nominations made as aforesaid shall be submitted to the Secretary, or to such other person as the Executive Committee may direct, accompanied by the amount of the dues for the remainder of the current year as provided in these by-laws, which amount shall be refunded in the event the nominee is not elected to membership.

Sec. 2. Election to Membership. Nominations for membership made and certified as provided in these by-laws shall be submitted by the Secretary, or such other person as directed by the Executive Committee, to the Executive Committee, which is vested with full power to elect or reject applicants or nominees for membership.

Applications or nominations for membership may

be submitted for action to the Executive Committee when in session or by mail to the members thereof. Two negative votes of members of Executive Committee shall prevent election to membership.

ARTICLE V

Dues

Sec. 1. Amount of Dues. Beginning January 1, 1935, each member shall pay to the Association Twelve Dollars ($12.00) dues for the period beginning January 1 of each year and ending the following December 31, payable January 1 of each year in advance, which sum shall include subscription of the member to the Association Journal, which is Two Dollars ($2.00) per year; provided that if more than one member of a law firm, or more than one person connected with the legal department of the home office of any Insurance Company, are members of this Association, then and in such case the annual dues for the members of such law firm or of such legal department shall be Twelve Dollars ($12.00) for one membership plus Three Dollars ($3.00) for each additional membership including, however, only one subscription to the Association Journal for all the members of such law firm or legal department who are members of this Association.

Sec. 2. Pro Rata Payment. A newly elected member shall pay in advance the dues prescribed in the foregoing Section pro rata for the balance of such calendar year in which he shall be elected, computed on a quarterly basis, beginning with the quarter of the calendar year in which the nominee or applicant shall be elected.

Sec. 3. Default In Payment. All members who shall be in default in the payment of dues for six months after the same shall become payable shall be notified by the Treasurer that unless such dues be paid within thirty days thereafter such default will be reported to the Executive Committee, which Committee may upon such report, without further notice, cause the name of such member to be stricken from the roll of membership, and the membership and all rights in respect thereto shall thereupon cease.

ARTICLE VI

Officers and Terms of Office

Sec. 1. The officers of the Association shall be:
A President.
Three Vice Presidents.
A Secretary and a Treasurer—the same person may act as Secretary and Treasurer.

Sec. 2. No elective officer or member of the Executive Committee shall receive any salary or compensation from the Association for services rendered, except such compensation as may be fixed by the Executive Committee for the Secretary and Treasurer. Provided that nothing herein contained shall prevent the Association or Executive Committee from authorizing and paying the actual expenses, of any such person, incurred in behalf of the Association.

Sec. 3. The President, Vice Presidents, Secretary and Treasurer shall be nominated and elected, in the manner hereinafter provided, by the Association at its annual meeting for terms of one year beginning at the close of the annual meeting at which they shall have been elected, and ending at the close of the next succeeding annual meeting, and until their respective successors shall have been elected and qualified; Provided, however, that no person be nominated for or elected to the office of Secretary for the year beginning at the close of the annual meeting held in August, 1934, during which time the incumbent at the time of the adoption of these by-laws shall continue in the office of Secretary.

Sec. 4. No person shall be eligible to succeed himself as President after he has served two successive terms as President.

ARTICLE VII

Executive Committee

Sec. 1. How Constituted. There shall be an Executive Committee which shall consist of the President, the last retiring President, the Vice Presidents, the Secretary and the Treasurer, and the Editor of the Journal, all of whom shall be members ex officio, together with nine members, each of said nine members to be from a different state or province, to be nominated and elected by the Association in manner hereinafter provided and so staggered that three members shall be chosen each year to serve for terms of three years, in the following manner:

At the 1934 Annual Meeting of the Association there shall be nominated and elected five elective members of the Executive Committee as follows:

One to serve for one year.
One to serve for two years.
Three to serve for three years.

The terms of all to begin at the close of the 1934 and end respectively at the close of the 1935, 1936 and 1937 annual meetings of the Association.

Members of the Executive Committee previously elected for terms expiring respectively at the close of the 1935 and 1936 annual meetings of the Association shall continue in office until the expiration of their said terms. Thereafter three elective members of the Executive Committee shall be elected at each annual meeting of the Association for terms of three years beginning at the close of the annual meeting at which they shall have been elected and ending at the close of the third succeeding annual meeting of the Association.

Sec. 2. Quorum. Eight members of the committee shall constitute a quorum.

Sec. 3. The Executive Committee shall fix the times and places of the annual meeting of the Association, shall cooperate with the President in arranging annual meeting programs; is empowered to strike from the membership rolls any member who in its judgment has ceased to be eligible for membership under the provisions of these by-laws, subject to the right of any member so stricken from the rolls to appeal to the Association upon due notice to the members; may elect an Executive Secretary and such other clerks and employees as the Executive Committee in its discretion deems necessary to conduct the work of the Association, none of whom need be members of the Association, and fix the duties and compensation of such Executive Secretary and other clerks and employees; and

shall have full power and authority, in the interval between meetings of the Association, to do all acts and perform all functions which the Association itself might do or perform, except that it shall have no power to amend these by-laws.

Sec. 4. The President, and in his absence, a Vice President (selected by the Executive Committee), shall be Chairman of the Executive Committee.

Sec. 5. Meetings. The Executive Committee shall meet immediately after the adjournment of the annual meeting—time and place to be fixed by the President, and at such other times and places as the President or a majority of its members may designate.

ARTICLE VIII

Nomination and Election of Officers

Sec. 1. Nominations. At the first session of each annual meeting of the Association the President shall appoint a nominating committee of five members of the Association which committee shall make and report to the Association nominations for the offices of President, three Vice Presidents, a Secretary, a Treasurer, and members of the Executive Committee to succeed those whose terms will expire at the close of the then annual meeting, and to fill vacancies then existing. Other nominations for the same offices may be made from the floor.

Sec. 2. Elections. All elections shall be by written ballot unless otherwise ordered by resolution duly adopted by the Association at the annual meeting at which the election is held.

ARTICLE IX

Vacancies

Sec. 1. A vacancy in the office of President shall be filled by a Vice President selected by the Executive Committee. Vacancies in the office of Secretary, Treasurer and elective members of the Executive Committee shall be filled by the Executive Committee. A person selected by the Executive Committee to fill a vacancy in the office of President, Secretary or Treasurer shall serve only for the unexpired term. Members of the Executive Committee so selected shall serve until the next annual meeting of the Association, at which time vacancies in the Executive Committee shall be filled by the Association—members so selected by the Association to serve for the unexpired terms.

ARTICLE X

Duties of Officers

Sec. 1. The President shall preside at all meetings of the Association and of the Executive Committee. He shall, with the cooperation of the Executive Committee arrange a program for the annual meeting of the Association. He shall deliver an address at each meeting. He shall, with the assistance of the Secretary, present to each meeting of the Association and of the Executive Committee an agenda of the matters to come before such meeting. He shall perform such other duties and acts as usually pertain to his office and as may be prescribed by the Association and/or Executive Committee.

Sec. 2. The Secretary shall be custodian of all books, papers and documents, except those of the Treasurer, and other property except money of the Association. He shall keep a true record of the proceedings of the Association and of the Executive Committee and shall perform all acts usually pertaining to his office and as may be prescribed by the Association and/or Executive Committee, all under the supervision and direction of the Executive Committee. He shall make reports of the Association's activities at every meeting of the Association and of the Executive Committee.

Sec. 3. Treasurer. The Treasurer shall perform the usual duties of a Treasurer in Associations of this kind, collect dues, keep accounts, and except for current expenses, shall disburse the moneys of the Association only upon direction of the Executive Committee of the Association, and shall make reports of the receipts and expenditures and financial condition of the Association at every meeting of the Association and of the Executive Committee. His accounts shall be audited annually by an auditor designated by the Executive Committee.

Sec. 4. The Executive Committee may, however, in its discretion and for such time as it deems necessary, empower the Secretary to collect the dues of the Association, to keep such accounts as are necessary, which shall be audited annually, and shall turn over to the Treasurer all such sums collected.

Sec. 5. Bonds. The Treasurer and Secretary shall give surety bonds in the sums and in such forms as the Executive Committee may prescribe, the premiums to be paid by the Association.

ARTICLE XI

Meetings

Sec. 1. The Association shall meet annually at such time and place as the Executive Committee may select.

Sec. 2. Special meetings may be called by the President or a majority of the members of the Executive Committee.

Sec. 3. Those present at any session of any meeting shall constitute a quorum, except for the purpose of changing the by-laws, for which purpose there shall be at least fifty members present to constitute a quorum.

ARTICLE XII

Committees

Sec. 1. The following committees shall be appointed annually by the President, each to consist of not more than five members, to serve for the year ensuing and until their respective successors shall be appointed.

On Health and Accident Insurance.

On Casualty Insurance.

On Fidelity and Surety Law.

On Fire and Marine Insurance.

On Life Insurance.

On Workmen's Compensation and Unemployment Insurance.

A Reception and Entertainment Committee.

In addition to the aforesaid Committees the President shall appoint such special committees as the Executive Committee may authorize, or as he, the President, may deem useful, to serve for one year

ensuing and until their successors shall be appointed, and to perform such duties as the Executive Committee may prescribe.

Sec. 2. The duties of the first six standing committees above mentioned shall be to study the present status of Federal and State Laws, changes or proposed changes therein and court decisions pertaining to that branch of Insurance designated in the name of the Committee, report the same to the Association, and when occasion requires recommend such action by the Association as may be deemed proper.

Sec. 3. The duties of the Reception and Entertainment Committee shall be to introduce members to each other, assist members in becoming acquainted, and provide entertainment at the annual meetings.

ARTICLE XIII

International Association of Insurance Counsel Journal

The Association shall publish, quarterly or at such times as may be fixed by the Executive Committee, a Journal. This publication shall be under the direction of the Executive Committee, which is authorized to appoint a sub-committee or Board of Editors to manage and conduct such Journal.

ARTICLE XIV

Complimentary Resolutions

No resolution complimentary to an officer or member for any services performed, paper read, or address delivered shall be considered by the Association.

ARTICLE XV

Amendments

These By-Laws may be amended or rescinded at any annual meeting of the Association by an affirmative vote of at least two-thirds of the members present at any session of such annual meeting provided there be not less than fifty members present at such session and provided, further, that notice of the proposed amendment or change be given by the Secretary to the members of the Association either by mail or publication in the Association Journal at least thirty days before the meeting at which such action is proposed.

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